TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 56

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER, SIXTH COMPENSATION DISTRICT, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

vs.

SUWANNEE FRUIT & STEAMSHIP COMPANY, A CORPORATION, AND FIDELITY & CASUALTY COMPANY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 14, 1948
CERTIORARI GRANTED JUNE 21, 1948

INDEX

In The United States Circuit Court of Appeals Fifth Circuit

No. 11,928

RICHARD P. LAWSON, as Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission,

Appellant,

vs.

SUWANNEE FRUIT & STEAMSHIP COMPANY, a corporation, and FIDELITY & CASUALTY COMPANY OF NEW YORK, a corporation,

Appellees

TRANSCRIPT OF RECORD ON APPEAL

Herbert S. Phillips, U. S. Attorney, and
Edith House, Asst. U. S. Attorney
U. S. Court House & Post Office Building
Jacksonville, Florida

Attorneys for Appellant

Harry T. Gray
Marks, Marks, Holt, Gray & Yates
1321 Graham Building
Jacksonville, Florida

Attorneys for Appellees

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 954-J-CIV

COMPLAINT UNDER LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

SUWANEE FRUIT & STEAMSHIP COMPANY, a corporation, and FIDELITY & CASUALTY COMPANY OF NEW YORK, a corporation,

Plaintiffs,

vs.

RICHARD P. LAWSON, as Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission,

Defendant.

Suwannee Fruit & Steamship Company, a corporation, hereinafter called the steamship company, and Fidelity & Casualty Company of New York, a corporation, hereinafter called the carrier, bring this cause for review of a compensation award under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A., Navigation and Navigable Waters, Sec. 901, et seq) against Richard P. Lawson, as Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission:

1. The steamship company at all times hereinafter men-

tioned was the employer of John Davis, who, by an award of the Deputy Commissioner dated the 14th day of May, 1945 and affirmed by this Court in the case of Suwanee Fruit & Steamship Company and Fidelity & Casualty Company of New York vs. Richard P. Lawson, as Deputy Commissioner, etc., in admiralty, No. 51-J, was held and found to have sustained an injury by accident arising out of and in the course of his employment which resulted in the permanent loss of vision of the left eye of more than 80%, the carrier having been found and held by said award and by said order of affirmance to be the insurer of the employer for said accident and injury, and in and by said award it was further provided:

> "And it is ordered by the Deputy Commissioner that this case be held open in order that evidence might be received and a determination made as to whether or not this claimant (John Davis) is entitled to receive compensation for permanent total disability or for permanent partial disability in addition to that awarded herein."

2. Thereafter, and on, to-wit, the 31st day of January, 1946, the Deputy Commissioner entered a supplementary award of compensation, a copy of which is hereto attached and a made a part hereof as Exhibit A.

3. This proceeding is for the purpose of reviewing said last named order, as provided by the Longshoremen's and Harbor Workers' Compensation Act above referred to, and particularly by Sec. 921 thereof.

4. The compensation benefits directed to be paid by the original award are being paid to the employee, John Davis, and will continue to be paid until said order has been fully complied with.

5. At the time the said employee, John Davis, sustained the injury by accident to his left eye he had already lost the sight of his right eye and was industrially blind in said eye

at said time, said blindness not having been caused by an injury by accident arising out of and in the course of his employment and compensable under the Longshoremen's and Harbor Workers' Compensation Act above referred to or any other compensation act, and no compensation benefits were or have been paid to the said employee on account of the loss of vision in his said right eye.

6. The loss of vision in the right eye was not contributed to, caused or aggravated or accelerated in any way by any accident by injury arising out of and in the course of the employment of the said employee with this employer, and the injury by accident for which compensation benefits were awarded to the left eye did not in any wise directly or indirectly affect the vision of the right eye.

7. The award of the Deputy Commissioner is not in accordance with law, in that the loss of sight in the right eye was not due to injury by accident arising out of and in the course of his employment with this employer and cannot be the basis for a compensation award against this employer; and this employer, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, is only liable for compensation benefits to the said employee arising from the injury by accident sustained while its employee, to-wit, the loss of vision in the left eye.

WHEREFORE plaintiffs pray that process in due form of law issue against the defendant and that they may have such relief as they are entitled to under the provisions of the Longshoremen's and Harbor Workers' Compensation Act above referred to, and that said award attached as Exhibit A be vacated, modified and set aside insofar as it awards benefits in conflict with the provisions of said act.

/s/ Harry T. Gray

Marks, Marks, Holt, Gray & Yates

Attorneys for Plaintiffs.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION SIXTH COMPENSATION DISTRICT

SUPPLEMENTARY COMPENSATION ORDER AWARD OF COMPENSATION

CASE NO. 518-16

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

JOHN DAVIS, *Claimant*

against

SUWANNEE FRUIT & STEAMSHIP COMPANY, Employer

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
Insurance Carrier

An order in this case was filed in the office of the Deputy Commissioner on May 14, 1945. Said order awarded to the claimant herein compensation for the loss of use of his left eye and provided that a later determination be made with respect to possible permanent total disability.

The case having been reviewed and further consideration having been given to the evidence in the record and no further hearing having been held or applied for by any interested party or considered necessary by the Deputy Commissioner the Deputy Commissioner makes the following additional

FINDINGS OF FACT

That since October 2, 1942, the claimant herein has been unable to perform any remunerative work and has only for

an occasional short period been able to do odd jobs of trifling character; that the claimant has been unable to compete in the open labor market because of his disability; that although he was blind in his right eye, the claimant had a definite earning capacity prior to and at the time of the injury of September 30, 1942, and that such earning capacity has been permanently destroyed by the injury of September 30, 1942; that the disability resulting from the injury of September 30, 1942 (i. e., the loss of use of the left eye) combined with the pre-existing disability (i. e., the loss of use of the right eye) has caused the claimant herein to be permanently and totally disabled; that the claimant, John Davis, is entitled to receive compensation during the continuance of such permanent total disability at the rate of Eight Dollars ($8.00) per week; that no part of such compensation is payable out of the Special fund established under the provisions of Section 44 of the Longshoremen's and Harbor Workers' Compensation Act; but that the employer, Suwannee Fruit and Steamship Company, and the insurance carrier, the Fidelity and Casualty Company of New York, are liable for the payment of such compensation for permanent total disability; that the employer has been paying compensation to the claimant as provided in the order of May 14, 1945.

Upon the foregoing facts and those found in the order of May 14, 1945, it is ordered by the Deputy Commissioner that the award made in such order of May 14, 1945, be modified in accordance with the following:

AWARD

The employer, Suwannee Fruit and Steamship Company and the insurance carrier, the Fidelity and Casualty Company of New York, shall pay to the claimant, John Davis of 1302 Wilcox Avenue, Jacksonville, Florida, compensation as follows: 174 weeks from October 2, 1942 to January 31, 1946, inclusive, at Eight Dollars ($8.00) per week or a total of One Thousand Three Hundred Ninety-Two Dollars ($1,392.-

00) and Eight Dollars ($8.00) per week thereafter during the continuance of total disability.

Given under my hand at Jacksonville, Florida, this 31st day of January, 1946.

(s) RICHARD P. LAWSON

Richard P. Lawson, Deputy Commissioner
Sixth Compensation District

(CAPTION OMITTED)

F I L E D
Apr 26 1946
JACKSONVILLE, FLA.
Edwin R. Williams, Clerk.

MOTION TO DISMISS

The defendant moves the Court to dismiss the action because the complaint fails to state a claim upon which relief can be granted.

/s/ HERBERT S. PHILLIPS

Herbert S. Phillips
United States Attorney

/s/ EDITH HOUSE

Edith House
Asst. United States Attorney

Attorneys for Defendant.

(CAPTION OMITTED)

F I L E D
Oct 11 1946
JACKSONVILLE, FLA.
Edwin R. Williams, Clerk.

O R D E R

All affected parties having been heard, after due notice, upon the matters hereinafter mentioned, it is upon consideration thereof:

ORDERED AND ADJUDGED:

1. Defendant's motion (filed April 26, 1946) to dismiss the action because the complaint fails to state a claim for relief against the defendant, is denied, the Court being of the opinion that although the employee is entitled to compensation for permanent total disability, the plaintiffs are liable only for permanent partial disability, as provided by 33 U. S. C. A. 908, and the remainder of such compensation should be paid from the special fund created by 33 U. S. C. A. 944.

DONE AND ORDERED at Jacksonville, Florida, October 11, 1946.

/s/ LOUIE W. STRUM,

Louie W. Strum
U. S. District Judge.

Copies—

Marks, Marks, Holt, GRAY & Yates,

District Attorney. (Miss House)

(CAPTION OMITTED)

OPINION OF COURT

FILED OCTOBER 11, 1946.

F I L E D
Oct 11 1946
JACKSONVILLE, FLA.
Edwin R. Williams, Clerk.

Suit by Suwannee Fruit & Steamship Company and Fidelity & Casualty Company of New York, Insurance Car-

rier, against Richard P. Lawson, Deputy Commissioner, to modify or restrain compensation award to John Davis, under Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. 908.

On motion to dismiss.

Motion denied.

Marks, Marks, Holt, Gray & Yates, Jacksonville, Florida, for plaintiffs

Herbert S. Phillips, District Attorney, Tampa Florida, and Edith House, Assistant District Attorney, Jacksonville, Florida, for defendant.

STRUM, District Judge:

While in the employ of Suwannee Fruit & Steamship Company, John Davis suffered the accidental loss of his *LEFT* eye under circumstances entitling him to compensation under the Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. 908. An award was made by the Deputy Commissioner, affirmed by this Court, awarding said employee compensation for permanent partial disability under sec. 8 (f) of the Act, which award is now being paid in due course by said employer.

Prior to entering the employ of Suwannee, the employee had lost the sight of his *RIGHT* eye in circumstances not entitling him to compensation for that eye, and no compensation benefits have heretofore been paid him for the loss of the right eye. The Deputy Commissioner has now made an award for permanent total disability based upon the combined effect of the two injuries, which award the employer seeks to restrain as unauthorized.

As the employee is now industrially blind in both eyes, he

is under the Act, entitled to compensation for total permanent disability. The sole and narrow question here is whether the present employer, Suwannee, is liable for *TOTAL* permanent disability, or whether said employer is liable only for the maximum compensation for *PARTIAL* permanent disability, the remainder to be paid out of the special fund created by sec. 44 of the Act, 33 U. S. C. A. 944.

Solution of the question depends upon a construction of sec. 8 (f) of the Act, 33 U. S. C. A. 908 (f), which provides:

"*INJURY INCREASING DISABILITY*:

(1) If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury; provided, however, that in addition to compensation for such permanent partial disability, and after the ~~cessation~~ of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in sec. 944 of this chapter."

Following the only known case on the subject, *National Hospital Association* vs *Britton*, 147 Fed. (2) 561, the Deputy Commissioner held the plaintiff employer liable for *TOTAL* permanent disability, which is the holding of the majority in that case. With due deference thereto, this Court is unable to follow the interpretation of sec. 8 (f) there adopted by the majority. This Court agrees with, and follows, the dissenting opinion of Judge Groner, which seems to clearly express not only the Congressional intent, but also the right and justice of the situation, without prejudice to the injured employee.

The above mentioned majority opinion concedes that when sec. 8 (f) is read in the usual and ordinary meaning of its words, it indicates clearly enough that in the circumstances here involved, the employer in whose employ the subsequent injury occurred, is liable only for the consequences of that injury, that is, for permanent *PARTIAL* disability. Difficulty arises only when the statutory definitions of "injury" and "disability," appearing in sec. 2, are interpolated into the context of sec. 8 (f) of the Act, where they produce incongruous results.

In the cited case the majority hold that—"Since (the employee's) previous incapacity did not arise out of the course of employment, the statutory phrase (sec. 8-f) has no application to this case." The employer in whose employ the second injury occurred, is held liable for the consequences of *BOTH* injuries, that is, for permanent *TOTAL* disability, though the first injury did not occur in that employer's employment, nor was he in any wise liable therefor.

If the majority opinion in the cited case is carried to its conclusion, it would result that where, as there (and here), an employee suffers an original injury, not in the course of employment, and suffers a second injury in the course of his present employment, that employer would be liable for the consequences of both injuries, and must compensate for total permanent disability, although the first injury had no connection whatever with the present employment. On the other hand, if the injury had been suffered in the course of some previous employment then the employer in whose employ the second injury occurred, would be liable only for permanent *PARTIAL* disability, that is, the consequences of the injury that occurred in the latter employment. This Court sees no intent in the Act to make an employer liable for *TOTAL* disability where a previous injury was not in the course of employment, and yet liable only for partial disability where the previous injury was in the course of employment. Rather does sec. 8 (f) indicate that the employer

should be liable only for the consequences of the injury suffered in his employment, the special fund to bear the remaining burden.

Moreover, the above mentioned interpretations of the Act will adversely affect the interests of partially disabled persons who seek employment. A prudent employer will not employ a person already under partial disability, if, as held by the majority in the cited case, he is liable for total disability caused in part by a previous injury, for which he is not liable, when combined with another injury occurring in his employ which of itself would produce only partial disability, and consequently a smaller liability.

This Court is of the opinion that Congress intended to use the words "injury" and "disability" in sec. 8 (f) in their ordinary sense, which produces a consistent harmonious, and logical result, whereas to interpolate into sec. 8 (f) the defined meaning of those words from sec. 2 leads to an anomaly. The principles of statutory construction applied by the majority in the cited case are abstractly correct, but the rigid application of those principles there made, produces a result which this Court believes is not only contrary to the Congressional intent, but is out of harmony with the remainder of the Act. The Court holds that the employee is entitled to full compensation for permanent *TOTAL* disability, but that this employer is liable only for permanent partial disability. The remainder should be paid from the special fund created by 33 U. S. C. A. 944.

Motion to dismiss denied.

/s/ LOUIE W. STRUM,

Louie W. Strum

U. S. District Judge.

(CAPTION OMITTED)

FILED

Oct 30 1946
JACKSONVILLE, FLA.
Edwin R. Williams, Clerk.

MOTION FOR FINAL JUDGMENT

Suwannee Fruit & Steamship Company and Fidelity & Casualty Company of New York, by their undersigned attorneys, respectfully show to the Court that the order and opinion on the motion to dismiss disposes of all of the real issues in this cause, and that a final judgment should be entered thereon unless the defendant desires to plead further.

Wherefore it is prayed that a final judgment be entered in conformity with the order entered herein on the 11 day of October, A. D. 1946.

/s/ Harry T. Gray

Marks, Marks, Holt, Gray & Yates

Attorneys for Plaintiffs,
1321 *Graham Building,*
Jacksonville, Florida.

(CAPTION OMITTED)

F I L E D
Nov 1 1946
JACKSONVILLE, FLA.
Edwin R. Williams, Clerk.

FINAL JUDGMENT

All affected parties having been heard, after due notice upon the motion of the plaintiffs for final judgment, filed herein October 30, 1946, and the defendant through his counsel having announced that no issues of fact can be raised by filing an answer, and that he does not desire to plead further by answer or otherwise, and the Court being of the view that all questions and issues herein have been disposed of by the order entered October 11, 1946, and by the opinion

of the Court filed herein on October 11, 1946:

IT IS ORDERED AND ADJUDGED:

1. That the allegations in plaintiffs' bill of complaint are true, and that the relief therein prayed for should be granted.

2. That the award of Richard P. Lawson, Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission, made the 31st day of January, 1946, which award modified a prior order or award dated May 14, 1945, be and it hereby is set aside insofar as it requires the plaintiffs or either of them to pay compensation for total permanent disability.

3. That the employee is entitled to compensation for permanent total disability, but that the plaintiffs are liable only for permanent partial disability as provided by 33 U. S. C. A. 908, and that the remainder of such compensation shall be paid from the Special Fund created by 33 U. S. C. A. 944, and it is ordered and adjudged that such compensation be paid from such Special Fund as provided by such law.

4. That said Richard P. Lawson, Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission and John Davis, the employee, be and hereby are permanently enjoined from enforcing from the plaintiffs or either of them, the payment of permanent total disability to the employee.

DONE AND ORDERED at Jacksonville, Florida, this 1st day of November, A. D. 1946.

/s/ LOUIE W. STRUM,

Louie W. Strum,

United States District Judge

(CAPTION OMITTED)

FILED

NOTICE OF APPEAL

TO: Suwannee Fruit and Steamship Company and Fidelity & Casualty Company of New York:

Notice is hereby given that Richard P. Lawson, as Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission, defendant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the first day of November, 1946.

/s/ HERBERT S. PHILLIPS
HERBERT S. PHILLIPS,
United States Attorney.

/s/ EDITH HOUSE
EDITH HOUSE
Asst. United States Attorney.

Attorneys for Richard P. Lawson, as Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission.

(CAPTION OMITTED)

STATEMENT OF POINTS TO BE URGED ON APPEAL.

The points which appellant intends to urge on appeal in this cause are:

1. The District Court erred in denying appellant's motion to dismiss the complaint.

2. The District Court erred in entering final judgment for the appellees granting the relief prayed for in their complaint and permanently enjoining the appellant from enforcing from the appellees, or either of them, the payment of compensation for permanent total disability to the injured employee.

3. The District Court erred in setting aside the appellant's order of January 31, 1946 requiring the appellees to pay to the injured employee compensation for permanent total disability.

4. The District Court erred in ruling that the appellees were liable to the injured employee for permanent partial disability only and that the remainder of the compensation allowed by appellant to the injured employee for permanent total disability should be paid from the Special Fund created by Title 33 U. S. C. A., Section 944.

/s/ HERBERT S. PHILLIPS

Herbert S. Phillips,

United States Attorney

/s/ EDITH HOUSE

Edith House,

Asst. United States Attorney

Attorneys for Appellant.

(CAPTION OMITTED)

FILED
Jan 29 1947
JACKSONVILLE, FLA.

Edwin R. Williams, Clerk.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The Clerk of the above District Court, in the preparation of the record on appeal taken in the above captioned cause by the defendant, Richard P. Lawson, as Deputy Commissioner, etc., is requested and directed to include the following:

1. Recite the filing and copy into the record the complaint.

2. Recite the filing and copy into the record the defendant's Motion to Dismiss, except omit the caption thereof.

3. Recite the filing and copy into the record the Court's order entered October 11, 1946 denying defendant's Motion to Dismiss, except omit the caption thereof.

4. Recite the filing and copy into the record the Opinion of the Court filed October 11, 1946, except omit the caption thereof.

5. Recite the filing and copy into the record the plaintiff's Motion for Final Judgment, except omit the caption thereof.

6. Recite the filing and copy into the record the Final Judgment entered November 1, 1946, except omit the caption thereof.

6½. Recite and copy Notice of Appeal, omitting caption.

7. Recite the filing and copy into the record the statement of Points to be urged by appellant on appeal, except omit the caption thereof.

8. Recite the filing and copy into the record this Designation of Contents of Record on Appeal, except omit the caption thereof.

/s/Herbert S. Phillips

Herbert S. Phillips,

United States Attorney

/s/Edith House

Edith House,

Asst. United States Attorney

Attorneys for Richard P. Lawson, as Deputy Commissioner, etc.

United States of America,)
) ss
Southern District of Florida.)

I, EDWIN R. WILLIAMS, Clerk of the United States District Court in and for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify that the foregoing pages numbered from 1 to 21, inclusive, contain a true copy of all such papers and proceedings in the cause of Suwannee Fruit & Steamship Company, a corporation, and Fidelity & Casualty Company of New York, a corporation, vs. Richard P. Lawson, as Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission, as appear upon the records and files of my office that have been directed to be included in said transcript by the agreement of the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Jacksonville, Florida, on this the 26th day of February, A. D. 1947.

(Seal)

/s/ EDWIN R. WILLIAMS, *Clerk*
U. S. District Court,
Southern District of Florida.

By L. Gibson House, *Deputy Clerk.*

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 27th, 1948

No. 11928

RICHARD P. LAWSON, As Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission

versus

SUWANNEE FRUIT & STEAMSHIP COMPANY, ET AL.

On this day this cause was called, and, after argument by Miss Edith House, Assistant United States Attorney, for appellant, and Harry T. Gray, Esq., for appellees, was submitted to the Court.

OPINION OF THE COURT—Filed February 20, 1948

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11928

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER, SIXTH COMPENSATION DISTRICT, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, APPELLANT,

versus

SUWANNEE FRUIT & STEAMSHIP COMPANY, ET AL., APPELLEES

Appeal from the District Court of the United States for the Southern District of Florida

(February 20, 1948)

Before HUTCHESON, MCCORD, AND LEE, Circuit Judges

MCCORD, Circuit Judge:

John Davis, through causes unconnected with industry and not attributable to injury by accident, lost the sight in his right eye to such an extent that he became industrially blind in that eye. Later, while in the employ of the Suwannee Fruit and Steamship Company, and through accident sustained in the course of his employment, he lost the sight in his left eye to the extent that he also became industrially blind in that eye. Davis is now permanently and totally disabled, as a result of permanent industrial blindness in both eyes.

The sole question with which we are concerned is whether the employer, Suwannee Fruit and Steamship Company, is liable for compensation to its employee, Davis, for permanent total disability, under provisions of the Longshoremen's and Harbor Workers Compensation Act, 33 USCA Section 908(a), or whether it is liable only for permanent partial disability, with the remainder of the allowed compensation to be paid out of the special fund created by Section 44 of the Act, 33 USCA 944.

The employer, Suwannee Fruit and Steamship Company, contends that under section 8(f) of the Act, 33 USCA, Section 908(f), it is relieved from liability for permanent total disability, and is only required to provide compensation for permanent partial disability.[1]

Appellant Commissioner contends that by virtue of the construction and interpretation placed on Section 8(f) of the Act by the courts, an employee is nevertheless entitled to total permanent disability compensation from an employer in such cases, regardless of any previous disability not sustained through industrial accident; that such construction is in accord with the intent and purpose of the compensation law, and that to hold otherwise would cast upon the special fund created by Section 44 of the Act burdens which it was never intended to bear.

We are of the opinion, and so hold, that appellees are liable to the employee, Davis, for permanent partial disability only, and that the remainder of the compensation allowed for total disability must come from the special fund created by the Act. 33 USCA Section 944.

Section 8(f) of the Act is clear and unambiguous, and therefore needs no construction. When read in its ordinary sense it can have but one meaning. It was clearly intended to restrict the liability of employers to only those employees disabled as a result of accidental injury sustained during their employment. Congress, in passing this section of the Act, intended to relieve industry from compensation for disabilities not caused by it. To give to Section 8(f) of the Act the strained and ingenious construction urged by the Commissioner is but to distort its true sense and meaning.

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[1] 33 USCA, Section 908(f), provides:

"Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a *previous disability*, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the *subsequent injury: Provided, however*, That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in Section 944 of this chapter."

U. S. v. Ryan, 284 U. S. 167. When we come to use the phrases "previous disability," and "subsequent injury," in Section 8(f), they should be construed in their plain and ordinary sense, and one which produces a consistent and logical result. To interpolate into this section the defined meaning of those terms from Section 2 alone leads to an anomaly. We can give to this section no reasonable construction which would make an employer liable for *total disability* where a previous injury *was not* received in the course of employment, and yet to make him liable only for *partial disability* where the previous injury *was* received in the course of employment. Lente v. Lucci, 119 Atl. 132; Catlett v. Chattanooga Handle Company, 55 S. W. 2d 257; Cain v. Staley Mfg. Co., 186 N. E. 265; Lehman v. Shmahl, 229 N. W. 553; National Homeopathic Hospital Association v. Briton, 147 F. 2d 561; see dissent of Chief Justice Groner.

The purpose of this section of the Act is to aid employees who have been partially and permanently disabled through causes unconnected with industrial accident. Certain it is that if industry is penalized by being forced to provide total permanent disability compensation to employees who were already partially and permanently disabled when employed, it would eventually decline to give employment to these handicapped individuals. Therefore, it follows that the construction given to this section by the Commissioner would deny aid to the very ones Congress was seeking to help.

We need only add that we are not concerned with whether the special fund created by Section 44 of the Act will be too quickly depleted by the effect of this and like decisions. We are not empowered to legislate, but only to construe the laws as enacted by the Congress. Kobilkin v. Pillsbury, 103 F. 2d 667.

We find no reversible error in the record and the judgment is therefore

Affirmed.

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

A True copy:
Teste:

Judgment

Extract from the Minutes of February 20, 1948

No. 11928

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER, SIXTH COMPENSATION DISTRICT, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,

versus

SUWANNEE FRUIT & STEAMSHIP COMPANY, ET AL.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Clerk's Certificate

UNITED STATES OF AMERICA

United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 20 to 25 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 11928, wherein Richard P. Lawson, as Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission, is appellant, and Suwanee Fruit & Steamship Company, et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 19 are identical with the printed record upon which the said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 17th day of March, A. D., 1948.

(S.) OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

[SEAL]

U. S. GOVERNMENT PRINTING OFFICE 1948

Supreme Court of the United States

Order allowing certiorari

Filed June 21, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER, SIXTH COMPENSATION DISTRICT, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, *Petitioner*

v.

SUWANNEE FRUIT & STEAMSHIP COMPANY, A Corporation, and FIDELITY & CASUALTY COMPANY OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of Richard P. Lawson, as Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission,[1] prays that a writ of certiorari

[1] The functions of the United States Employees' Compensation Commission were transferred to the Federal Security Agency effective July 16, 1946. 1946 Reorganization Plan No. 2, Section 3, 11 F. R. 7873, 60 Stat. 1095. On the same day a Bureau of Employees' Compensation was established and the essential functions of the compensation commission were assigned to the director of the bureau. Federal Security Agency Order 58, 11 F. R. 7943.

issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled case on February 20, 1948.

OPINION BELOW

The opinion of the district court (R. 9-12) is reported at 68 F. Supp. 616. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 21-23) is reported at 166 F. 2d 13.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 20, 1948 (R. 24). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended.

QUESTION PRESENTED

Section 8(f)(1) of the Longshoremen's and Harbor Workers' Compensation Act provides: "If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury". As defined elsewhere in the Act, "disability" means a reduction in earning capacity "because of injury"; and "injury" means "accidental injury or death arising out of and in the course of employment".

An employee who had previously lost the sight of his right eye became permanently and totally disabled through the loss of the sight of his left

eye in an industrial accident. The previous loss of sight in the right eye did not result from an injury in the course of employment. The question presented is whether the court below erred in holding that the term "previous disability" in Section 8(f)(1) includes a prior physical injury not arising "out of and in the course of employment", and hence limits the employer's liability only to compensation for the partial disability caused by the subsequent injury.

STATUTE INVOLVED

Relevant portions of the Longshoremen's and Harbor Workers' Compensation Act are set forth in the Appendix, *infra*, pp. 15-17.

STATEMENT

This suit was brought to review a compensation award under Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. Sec. 901, *et seq.* (R. 2). John Davis, an employee of the Suwannee Fruit & Steamship Company, sustained an injury by accident, in circumstances entitling him to compensation under that Act, which resulted in the permanent loss of vision in his left eye (R. 6-9). At the time the employee sustained this injury he had already lost the sight of his right eye (R. 3). Blindness in his right eye, however, had not been caused by any injury compensable under the Longshoremen's and Harbor Workers' Compensation Act or any other compensation act, and no compensation benefits had been paid to the employee on account of the loss of vision in his right eye (R. 4). The loss of sight in the em-

ployee's left eye, combined with the pre-existing blindness in his right eye, rendered him permanently and totally disabled (R. 6).

On May 14, 1945, the Deputy Commissioner for the United States Employees' Compensation Commission, Sixth Compensation District, awarded the employee compensation for the loss of sight in his left eye (R. 3). At the same time it was ordered that the case be held open in order to determine whether an additional award should be made for permanent total disability or for permanent partial disability (R. 3). On January 31, 1946, it was found that the employee was permanently and *totally* disabled, and an award of $8.00 per week during the continuance of the total disability was made against the employer and its insurance carrier, the Fidelity and Casualty Company of New York (R. 6-7).

The employer and the insurance carrier brought suit to set aside the award imposing liability for total permanent disability on the ground that their liability was limited to compensation for the disability which would have resulted from the injury to the employee's left eye (R. 4). The district court denied a motion to dismiss the complaint and upheld this claim in reliance on Section 8(f)(1) of the Act (33 U. S. C. 908(f)(1)) (R. 11). The Government's claim that "previous disability" in Section 8(f) was to be interpreted in accordance with the statutory definitions and thus limited to prior industrial injuries was rejected; the exemption was considered applicable regardless of the

origin of the prior physical defect (R. 12). The employer was held liable only for compensation for permanent partial disability for the loss of an eye and the remainder of compensation for permanent total disability was directed to be paid from the special fund created by Section 44 of the Act (R. 11-12; 14). Since there were no issues of fact and the deputy commissioner did not desire to plead further, the award was set aside as requested (R. 14). This judgment was affirmed by the court below (R. 21-23).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to direct the district court to dismiss the complaint.

2. In holding that the employer and the carrier were not liable for compensation for permanent total disability to the injured employee.

3. In affirming the judgment of the district court.

REASONS FOR GRANTING THE WRIT

The record does not disclose the specific cause of the "previous disability." The complaint recites that at the time of the accident the employee "had already lost the sight of his right eye," that the blindness in this eye had not been "caused by an injury by accident arising out of and in the course of his employment" and was not "compensable under the Longshoremen's and Harbor Workers' Compensation Act * * * or any other

compensation act," and that no compensation benefits had been paid for the loss of vision in this eye (R. 3-4). Neither the findings of fact in the compensation award nor the opinion of the district court sheds additional light on whether the sight of the right eye was lost through disease, nonindustrial accident or congenital defect (R. 5-6, 9). The decision of the court below must therefore be taken to mean that any physical defect existing at the time of an industrial injury, whatever the cause, is a "previous disability" within the meaning of Section 8(f) and, to the extent that it contributes to the consequences of the industrial injury, requires a *pro tanto* reduction in the employer's liability.

1. The broad construction of "previous disability" by the court below is, as the court below indicated (R. 23), in direct conflict with the recent decision of the Court of Appeals for the District of Columbia in *National Homeopathic Hospital Association* v. *Britton*, 147 F. 2d 561, certiorari denied, 325 U. S. 857, and is out of harmony with decisions of the lower federal courts dating back to the early days of the Longshoremen's and Harbor Workers' Compensation Act. *Grays Harbor Stevedore Co.* v. *Marshall*, 36 F. 2d 814 (W. D. Wash.); *Liberty Stevedoring Company* v. *Cardillo*, 18 F. Supp. 729 (E. D. N. Y.); *Wood Preserving Corp.* v. *McManigal*, 39 F. Supp. 177 (W. D. Ky.); *Seime-Spokane Co.* v. *Marshall*, Civil Action No. 640 (W. D. Wash.) (decided April 1, 1943, not re-

ported): *Tennessee River Co. v. La Garde*, 65 F. Supp. 161 (D. Minn.).

In the *National Homeopathic* case the employee had suffered previous accidents not connected with any employment which resulted in the amputation of his left leg and left arm and in the fracture of his right kneecap. In the course of his employment, he again fractured his right kneecap. This fracture, because of the previous fracture and amputations, resulted in permanent total disability. The award of the deputy commissioner imposing liability for permanent total disability upon the employer and the insurance carrier was upheld. Contrary to the decision of the court below, the Court of Appeals for the District of Columbia held that the provision of Section 8(f)(1) of the Act, limiting an employer's liability where the permanent total disability resulted from the combination of a previous disability and the subsequent injury, did not apply unless the prior physical defect resulted from an accidental injury arising out of and in the course of employment. The court reached this conclusion by interpreting "previous disability" in Section 8(f), in accordance with the definitions contained in Section 2 of the Act, discussed *infra*, p. 9.

The other decisions also involved situations in which an industrial injury in combination with a pre-existing physical impairment resulted in a greater disability than the subsequent injury alone would have produced. In all of them the courts held the prior defect not to be a "previous disabil-

ity" within the meaning of Section 8(f) and refused to abate the employer's liability for the full consequences of the injury.

Claims involving prior physical defects are constantly arising and the conflict of the decision below with the decisions of other federal courts should be resolved to establish the proper standards to be applied by the deputy commissioners in making awards and to permit a uniform construction and administration of the Act in the several compensation districts.

2. The decision below seems to be wrong as a matter of statutory construction. Under the language of Section 8(f) the employer is required to "provide compensation only for the disability caused by the subsequent injury" if the employee was suffering from "a previous disability" at the time of the subsequent injury. In the event the subsequent injury itself would cause only permanent partial disability but combined with the previous disability results in permanent total disability, the employer pays compensation for the permanent partial disability and "the remainder of the compensation that would be due for permanent total disability * * * shall be paid out of the special fund established in section 44." Section 8(f)(1). In all other cases in which an injury follows a previous disability the employer is relieved from liability for the full consequences of the sub-

[2] The subject has received considerable attention in decisions, statutes and industrial studies. See Dodd, *Administration of Workmen's Compensation* (1936), pp. 662-680.

sequent injury without provision for additional compensation to the employee from any other source. Section 8(f)(2).

It is the Government's contention that, under the definitions in the Act, the limitation of the employer's liability provided by Section 8(f) applies only where the "previous disability" has resulted from a prior industrial accident. Although the term "disability" in its ordinary sense might conceivably embrace a physical impairment of any character, however created, this meaning "is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others." *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96. The statute provides that "when used in this Act * * * 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury" and that "the term 'injury' means accidental injury or death arising out of and in the course of employment." Section 2(2) and (10).

Applying these definitions, the phrase "previous disability" in Section 8(f) means a previous incapacity to earn wages because of an industrial injury. Only by rejecting these definitions can it be held that the exemption applies regardless of the nature and origin of the prior physical impairment. Ordinary rules of statutory construction do not furnish a basis for abandoning these statutory definitions. The structure of the statute suggests that "disability" in Section 8(f) has the same meaning as in other parts of the statute. Section 8

deals in its entirety with "compensation for disability." The term "disability" is used frequently throughout the section in its statutory sense. There would seem to be little justification for changing this meaning in one sub-section of an otherwise consistent pattern without some statutory indication that this was intended. The statute affords no evidence of such an intention.

The construction of "previous disability" which we urge has been adopted not only in the several federal court decisions referred to above but also in decisions of the state courts of New York interpreting a comparable relieving provision in its workmen's compensation law.[3] These decisions consistently refuse to reduce the employer's liability where the previous physical impairment was "not caused by an industrial accident." *In Belle*

[3] The New York statute has frequently been referred to as the model for the federal law. See, *e.g.* H. Rep. 1357, 70th Cong., 1st sess., p. 2; *Hartford Accident & Indemnity Co.* v. *Hooge*, 85 F. 2d 411 (App. D. C.); *Employers' Liability Assur. Corp., Ltd.* v. *Monahan*, 91 F. 2d 130 (C. C. A. 1); *Luckenbach S. S. Co., Inc.* v. *Marshall*, 49 F. 2d 625 (D. Ore.). New York Workmen's Compensation Law, Section 15(7), provides as follows: "The fact that an employee has suffered *previous disability* or received compensation therefor shall not preclude him from compensation for a *later injury* nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a *previous disability* shall not receive compensation for a *later injury* in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability." [Italics supplied]

v. *Britton Stone & Supply Corp.*, 247 App. Div. 843; *Van Oosterhout v. Sisters of the Good Shepherd*, 249 App. Div. 898; *Berrilacqua v. Clark*, 225 App. Div. 190, affirmed, 250 N. Y. 589; *Pyshanck v. Henry Forge & Tool, Inc.*, 272 N. Y. 546, affirming 247 App. Div. 842; *Finegan v. Mintern & Son*, 270 App. Div. 868; with *Schavick v. Bayer Co.*, 272 N. Y. 217, compare *Anderson v. Babcock & Wilcox Co.*, 256 N. Y. 146. But cf. *Lehman v. Schmahl*, 179 Minn. 388.

The interpretation of Section 8(f) by the court below, by enlarging the employer's exemption from liability for some of the consequences of industrial accidents, defeats in some measure the social policy of the workmen's compensation laws to relieve employees of the burden of industrial accidents. *National Homeopathic Hospital Ass'n v. Britton*, *infra* at 564. The limitation on liability also runs counter to the usual rule of liability in tort and workmen's compensation laws. *Restatement of Torts, Negligence*, § 461; Harper, *Law of Torts* (1933) §§ 113, 129, 214. Under this and other workmen's compensation statutes, the courts have frequently rejected as a defense to a compensation award an employee's prior physical infirmity. This has been so where the subsequent disability would not have occurred but for the prior physical defect (*Pacific Employers' Ins. Co. v. Pillsbury*, 61 F. 2d 101 (C. C. A. 9); *Hoage v. Employers' Liability Assurance Corp.*, 64 F. 2d 715 (App. D. C.), certiorari denied, 290 U. S. 637; *Commercial Casualty Insurance Co. v. Hoage*, 75 F. 2d 677 (App. D. C.),

certiorari denied, 295 U. S. 733; *Hoage v. Royal Indemnity Co.*, 90 F. 2d 387 (App. D. C.), certiorari denied, 302 U. S. 736) and where the extent of the disability has been increased because of the previous disability. *Warlop v. Western Coal & Mining Co.*, 24 F. 2d 926 (C. C. A. 8); *New Amsterdam Casualty Co. v. Cardillo*, 108 F. 2d 492 (App. D. C.); *Great Atlantic & Pacific Tea Co. v. Cardillo*, 127 F. 2d 334 (App. D. C.). In many cases presenting factual situations virtually identical with that in the instant case, where the employee had previously lost the use of one eye or some other member and thereafter lost the remaining member in an industrial accident, the employer has been held liable for compensation for total and permanent disability. See, *e.g.*; *Killisnoo Packing Co. v. Scott*, 14 F. 2d 86 (C. C. A. 9); *Moore v. Western Coal Mining Co.*, 124 Kans. 214; *Liptak v. Industrial Accident Comm. of California*, 200 Cal. 39; *In re Braconnier*, 223 Mass. 273; *Wabash Railway Co. v. Industrial Commission*, 286 Ill. 194; *Nease v. Hughes-Stone Co.*, 114 Okla. 170. Although these decisions did not involve the interpretation of a relieving provision comparable to Section 8(f), they reflect the general policy of the workmen's compensation statutes.

Since Section 8(f) provides an exception to the usual rule of compensation for industrial injury and operates contrary to the workmen's compensation principle of relieving employees of the burdens of industrial accidents, it should be strictly construed. *National Homeopathic Hospital Ass'n*

v. *Britton*, 147 F. 2d 561, 564 (App. D. C.); *Liptak v. Industrial Accident Commission*, 200 Cal. 39; cf. *Phillips Co. v. Walling*, 324 U. S. 490, 493; *Piedmont & Northern Railway Company v. Interstate Commerce Commission*, 286 U. S. 299, 311. If permitted to stand, the decision below will encourage employers to oppose awards in cases where an employee's disability has been increased because of a previous heart ailment, arthritic condition or other internal disease or physical anomaly. The allowance of such claims to reduced compensation will not only create a departure from existing law (see cases cited pp. 11-12, *supra*), but will impose on the deputy commissioners the frequent and virtually impossible task of apportioning a disability between an injury and a prior ailment. Cf. *Schavick v. Bayer Co.*, *supra*. Accordingly, the phrase "previous disability" in Section 8(f) should be interpreted in the light of the statutory definitions. The exemption, properly construed, is applicable only where an employee's physical incapacity results from a prior industrial accident for which, presumably, he has received compensation. In disregarding the statutory definitions of "disability" and "injury" and holding in effect that the employer's liability must be reduced wherever an employee's physical defect, regardless of its nature or origin, increases the extent of the disability, the court below appears to have extended the exemption beyond the limits marked by Congress.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

May, 1948.

APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. 901, *et seq.*, provides, in part, as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

* * * * * *

COMPENSATION FOR DISABILITY

SEC. 8. Compensation for disability shall be paid to the employee as follows:

* * * * * *

(f) Injury increasing disability. (1) If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subse-

quent injury: *Provided, however*, That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44.

(2) In all other cases in which, following a previous disability, an employee receives an injury which is not covered by (1) of this subdivision, the employer shall provide compensation only for the disability caused by the subsequent injury. In determining compensation for the subsequent injury or for death resulting therefrom, the average weekly wages shall be such sum as will reasonably represent the earning capacity of the employee at the time of the subsequent injury.

* * * * *

REVIEW OF COMPENSATION ORDERS

SEC. 21. * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

* * * * *

SPECIAL FUND

SEC. 44. (a) There is hereby established in the Treasury of the United States a special fund for the purpose of making payments in accordance with the provisions of subsections (f) and (g) of section 8 of this Act.

* * * * * * *

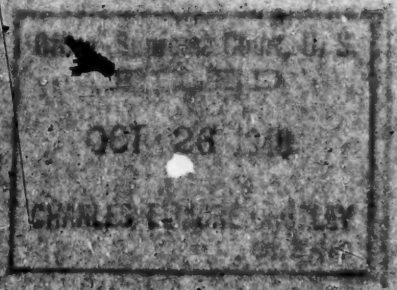
(c) Payments into such fund shall be made as follows:

(1) Each employer shall pay $1,000 as compensation for the death of an employee of such employer resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for such death. Fifty per centum of each such payment shall be available for the payments under subdivision (f) of section 8, and 50 per centum shall be available for payments under subdivision (g) of section 8.

(2) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

* * * * * * *

(g) All civil penalties provided for in this Act shall be collected by civil suit brought by the commission.



No. 56

In the Supreme Court of the United States

OCTOBER TERM, 1948

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER, SIXTH COMPENSATION DISTRICT, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

SUWANNEE FRUIT & STEAMSHIP COMPANY, A CORPORATION, AND FIDELITY & CASUALTY COMPANY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the District Court (R. 9–12) is reported at 68 F. Supp. 616. The opinion of the Court of Appeals for the Fifth Circuit (R. 21–23) is reported at 166 F. 2d 13.

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1948 (R. 24). The petition for a writ of certiorari was filed on May 14,

1948, and was granted on June 21, 1948 (R. 26). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended, now 28 U. S. C. 1254.

QUESTION PRESENTED

Section 8 (f) (1) of the Longshoremen's and Harbor Workers' Compensation Act provides: "If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury." As defined elsewhere in the Act, "disability" means a reduction in earning capacity "because of injury"; and "injury" means "accidental injury or death arising out of and in the course of employment."

An employee who had previously lost the sight of his right eye became permanently and totally disabled through the loss of the sight of his left eye in an industrial accident. The previous loss of sight in the right eye did not result from an injury in the course of employment. The question presented is whether the court below was correct in holding, in disregard of the statutory definitions, that the term "previous disability" in Section 8 (f) (1) includes a prior physical injury not arising "out of and in the course of employment," and hence limits the employer's

liability only to compensation for the partial disability caused by the subsequent injury.

STATUTE INVOLVED

Relevant portions of the Longshoremen's and Harbor Workers' Compensation Act are set forth in the Appendix, *infra*, pp. 36–38.

STATEMENT

This suit was brought to review a compensation award under Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. Sec. 901, *et seq.* (R. 2). John Davis, an employee of the Suwannee Fruit & Steamship Company, sustained an injury by accident, in circumstances entitling him to compensation under that Act, which resulted in the permanent loss of vision in his left eye (R. 6–9). At the time of this injury he had already lost the sight of his right eye (R. 3). The blindness in his right eye, however, had not been caused by any injury compensable under the Longshoremen's and Harbor Workers' Compensation Act or any other compensation act, and no compensation benefits had been paid to the employee on account of the loss of vision in his right eye (R. 4, 9). The record does not disclose any loss in earning capacity resulting from this earlier physical impairment. The loss of sight in the employee's left eye, combined with the preexisting blindness in his right eye, however, rendered him permanently and totally disabled (R. 6).

On May 14, 1945, the Deputy Commissioner for the United States Employees' Compensation Commission,[1] Sixth Compensation District, awarded the employee compensation for the loss of sight in his left eye (R. 3). At the same time it was ordered that the case be held open in order to determine whether an additional award should be made for permanent total disability (R. 3). On January 31, 1946, it was found that the employee was permanently and totally disabled, and an award of $8.09 per week during the continuance of the total disability was made against the employer and its insurance carrier, the Fidelity and Casualty Company of New York (R. 6–7).

The employer and the insurance carrier brought suit to set aside the award for total permanent disability on the ground that at the time of the injury the employee had "a previous disability" within the meaning of Section 8 (f) (1) and, consequently, that their liability was limited to compensation for the disability which would have resulted only from the injury to the employee's left eye (R. 4). The Government moved to dismiss the suit on the ground that under the statu-

[1] The functions of the United States Employees' Compensation Commission were transferred to the Federal Security Agency effective July 16, 1946. 1946 Reorganization Plan No. 2, Section 3, 11 F. R. 7873, 60 Stat. 1095. On the same day a Bureau of Employees' Compensation was established and the essential functions of the compensation commission were assigned to the director of the bureau. Federal Security Agency Order 58, 11 F. R. 7943.

tory definition "previous disability" was limited to prior physical defects resulting from industrial injuries. This motion was denied; the statutory definitions were considered inapplicable and the exemption was held applicable regardless of the origin of the prior physical defect (R. 11, 12). The employer was held liable only for permanent partial disability occasioned by the loss of one eye and the additional compensation for permanent total disability was directed to be paid from the special fund created by Section 44 of the Act (R. 11–12, 14). Since there were no issues of fact and the deputy commissioner did not desire to plead further, the award was set aside by the District Court (R. 14). This judgment was affirmed by the court below (R. 21–23).

SPECIFICATION OF ERRORS

The court below erred:

1. In failing to direct the District Court to dismiss the complaint.

2. In holding that the employer and the carrier were not liable for compensation for permanent total disability to the injured employee.

3. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

The Longshoremen's and Harbor Workers' Act relieves employers from liability for part of the consequences of industrial accidents when the

damages resulting from the injury are increased by the existence of a previous disability. Section 8 (f) provides that the employer is required to "provide compensation only for the disability caused by the subsequent injury" if the employee was suffering from "a previous disability" at the time of the subsequent injury. As a result of this limiting provision, the employer's liability is for less than the amount necessary to make the employee whole under the statute's compensation standards. In some circumstances, this burden is borne by a special statutory fund; in others it is imposed upon the injured employee. Under defined conditions, when permanent total disability results from the combined effects of the previous disability and the subsequent injury, "the remainder of the compensation [not charged to the employer] that would be due for permanent total disability * * *, shall be paid out of the special fund established in section 44." Section 8 (f) (1). In all other cases, including all cases in which the disability is less than permanent and total, there is no provision for compensation from any other source. Section 8 (f) (2).

It is the Government's view that these exemptive provisions are applicable only if an employee has suffered a prior industrial injury which has resulted in disability. This result is required by interpreting Section 8 (f) in accordance with the statutory definitions. The occasion

for a limitation of liability is the existence of "a previous disability." Under subdivisions (2) and (10) of Section 2, a "disability" is defined as a reduction in earning capacity because of accidental injury "arising out of and in the course of employment." In the instant case there is no showing that the employee's preexisting physical impairment was the consequence of an industrial injury or that it resulted in a reduction in earning capacity. Only by rejecting the statutory definitions and reading previous disability "in its ordinary sense" (R. 22) was the court below able to bring respondents within the scope of Section 8 (f). We submit that neither the policy of the statute nor its legislative history justifies a departure from the normal statutory meaning.

Furthermore, the broad interpretation of the court below is opposed to the fundamental compensation principle of relieving employees of the burdens of industrial accidents. Section 8 (f) (1) purports to make the employee whole by providing for additional compensation out of a special fund. But the sweeping scope and indefinite nature of the exemption, as construed below, creates a real possibility that the fund may prove inadequate to meet the increased charges. In this event, the employee will be required to bear the loss. A broad interpretation will also extend the scope of Section 8 (f) (2) where no additional compensation is provided for the employee.

It is generally agreed that the policy of aiding handicapped workers, which is responsible for the enactment of provisions reducing the employers' liability, should not operate to defeat the fundamental purpose of relieving employees from the burden of industrial accidents. There is little question that the liability-relieving provisions in issue here have been incorporated in workmen's compensation legislation to encourage the employment of handicapped persons. The companion so-called second injury funds have been provided to assure full compensation to the employee notwithstanding the employer's curtailed liability. In weighing the problem of providing incentives to hire the handicapped and at the same time of establishing financially sound subsequent injury plans devoid of complicated administrative problems, the overwhelming preference, based upon experience with various types of plans, has been in favor of limited and specifically defined second injury provisions. By reading Section 8 (f) in accordance with the definitions in the Act, the specific type plan is attained. By disregarding these definitions in the manner of the court below, the exemptions assume that vague content which has earned the almost universal condemnation of workmen's compensation experts.

ARGUMENT

The issue in this case relates to the meaning of "previous disability" in Section 8 (f) of the

Longshoremen's and Harbor Workers' Compensation Act (Appendix, *infra*, pp. 36–37). Under Section 8 (f) (1) an employee who sustains a permanent total disability is entitled to be compensated in full. However, if he was suffering from a "previous disability" when injured, his employer's liability is limited to compensation for the disability which would have resulted from the subsequent injury alone. In such a case, the compensation of which the employer is relieved is paid out of a special fund created under Section 44 of the Act. However, if the prior physical defect did not constitute a previous disability", the employer must provide full compensation, without recourse to the Section 44 fund. Under Section 8 (f) (2), which applies in cases where the subsequent injury does not result in permanent total disability, the employer is required to provide compensation only for the disability attributable to the subsequent injury, and the injured employee has no recourse to the Section 44 fund.

In the present case the permanent total disability was produced by the combined effect of the subsequent injury and the preexisting physical impairment which did not result from an industrial accident. The question presented is whether such prior defect constitutes a "previous disability", within the meaning of Section 8 (f) (1). It is the Government's contention that "previous disability" is a term of art, expressly defined in the statute to

exclude injury not arising out of and in the course of employment", and that consequently Section 8 (f) (1) cannot be invoked here to enable the employer to shift to the Section 44 fund any part of his liability for full compensation for permanent total disability.

Our primary reliance is upon the clear definitions provided by Section 2 of the Act. Section 2 (10) defines "disability" to mean a reduction in an employee's earning capacity because of "injury"; and Section 2 (10) defines injury to mean "accidental injury or death arising out of and in the course of employment". "Injury" and "disability" are technical terms, the construction of which is determined by reference to the explicit definitions furnished by the statute.

However, we do not rest solely on the words of the Act. On grounds of policy, the Government urges that the interpretation of the court below, which permits the employer to disclaim partial liability whenever an employee's prior physical condition increased the disability resulting from the subsequent injury, is in conflict with basic principles of workmen's compensation legislation. The interpretation below creates a danger that the Section 44 fund may prove inadequate and be exhausted. In such event, the injured employee would not, as a practical matter, receive full compensation. Moreover, the construction below would have the further effect

of extending the employer's exemption from liability under Section 8 (f) (2), where the employee suffers a disability less than permanent and total; and under that subsection the employee cannot resort to the Section 44 fund. The result would be that the disabled employee would be denied compensation which the Act clearly contemplates that he should receive.

Our interpretation of Section 8 (f), which accepts rather than rejects the statutory definitions, receives support from the almost universal opinion of experts in the field that so-called second injury provisions, such as are contained in Section 8 (f), should be precise and specific in their construction and application. The special purpose of encouraging the hiring of handicapped workers, which these second injury provisions were designed to serve, ordinarily has been considered subordinate to the more basic purposes of workmen's compensation legislation, wherever conflict between them should arise. Thus, in order to maintain the solvency of second injury funds and to guard against the administrative delays resulting from vague provisions which would encourage wholesale defenses to claims, it has been considered necessary in employees' compensation legislation to have second injury exemptions specifically defined either by designating special classes of physical impairments to which they relate or by limiting their application

to prior industrial injuries. Although the legislative history of Section 8 (f) is quite barren on the specific point involved in this case, it does indicate in a general way that Congress intended the section to serve the usual purpose of comparable provisions. This purpose is best accomplished by faithful adherence to the definitions in the statute, particularly since all relevant policy considerations militate against converting Section 8 (f) by judicial interpretation into a general, undefined exemption extending to any preexisting physical infirmity, regardless of the circumstances in which it occurred and regardless of whether it impaired the employee's earning capacity.

I

UNDER THE STATUTORY DEFINITIONS "PREVIOUS DISABILITY" DOES NOT ENCOMPASS ALL PREEXISTING PHYSICAL DEFECTS BUT ONLY THOSE WHICH AROSE "OUT OF AND IN THE COURSE OF EMPLOYMENT"

Under the express definitions in the Act, the limitation of the employer's liability provided by Section 8 (f) applies only where the "previous disability" has resulted from a prior industrial accident. In this case, it affirmatively appears that the previous blindness in the right eye was not caused by an industrial accident. The employer's complaint seeking review of the compensation award recited that the blindness in the employee's right eye had not been "caused by an injury by accident arising out of and in the course of his

employment" and was not "compensable under the Longshoremen's and Harbor Workers' Compensation Act * * * or any other compensation act," and that no compensation benefits had been paid for the loss of vision in this eye (R. 3–4). The defendant moved to dismiss the action solely on the ground that the complaint failed to state a cause of action (R. 7), and this motion was denied by the district court (R. 8). Both courts below dealt with the case on the assumption that the employee had lost the sight of his right eye in circumstances not entitling him to compensation for such loss, and that no compensation benefits had been paid him for the loss of the right eye (R. 9, 21). The decision of the court below must therefore be taken to mean that any physical defect existing at the time of an industrial injury, whatever the cause, is a "previous disability" within the meaning of Section 8 (f) and, to the extent that it contributes to the disability resulting from the subsequent industrial injury, requires a *pro tanto* reduction in the employer's liability.

This interpretation cannot be squared with the statutory definitions. Although the term "disability", if used in a broad colloquial sense, might embrace a physical impairment of any character, however created, this meaning "is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of

all others." *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96. The statute provides that "when used in this Act * * * 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury", and "the term 'injury' means accidental injury or death arising out of and in the course of employment." Section 2 (2) and (10). Applying these definitions, the phrase "previous disability" in Section 8 (f) means a previous incapacity to earn wages because of an industrial injury.

Only by rejecting these statutory definitions can the exemption be invoked, regardless of the nature and origin of the prior physical impairment. Ordinary rules of statutory construction, however, furnish no basis for rejecting the specific definitions which Congress has provided. The structure of the statute suggests that "disability" in Section 8 (f) has the same meaning as in other parts of the statute. Section 8 in its entirety deals with "compensation for disability." The term "disability" is used frequently throughout the section in its statutory sense. There would seem to be little justification for changing this meaning in one subsection of an otherwise consistent pattern without some statutory indication that this was intended.[2] The statute affords no

[2] In *National Homeopathic Hospital Association* v. *Britton*, 147 F. 2d 561, 563, n. 5 (App. D. C.), the court said: "Throughout the fifty sections of the compensation act the words 'disability' and 'injury' are used repeatedly in their

evidence of such an intention. If Congress intended the exemption to extend beyond "disability" in the statutory sense, it would have been a simple matter, particularly in the light of the structure of Section 8, to have the provision read "previous disability or physical impairment" or some such broader phraseology.

Moreover, if the statutory test of disability is rejected for this single section, no alternative definition of "previous disability" is provided or available to give hard content to the standard the deputy commissioners will be required to apply. Since the exemption could be invoked regardless of whether the prior injury occurred in an industrial accident, such physical defects as a weak heart, diseased kidney, hernia, arthritis, or any other internal or external ailment which contributed to the consequences of a subsequent injury, could predicate an employer's claim to reduced liability. The deputy commissioners presumably would then be required to decide whether the employee was suffering from a physical defect at the time of injury and, if so, whether this contributed to the extent of the disability. The

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specially defined senses. Appellants would read them differently in § 908 (f). But 'disability' is used in some twenty other instances in § 908 itself, and in each instance it clearly carries its specially defined sense. We think Congress would have used a different word in § 908 (f), or would have added a qualifying phrase, if it had intended to refer to *incapacity* or *defect* from whatever cause and not merely to 'disability' as defined."

award against the employer would then be limited to the disability that would have resulted from the injury alone. In the absence of a specific statutory requirement, it should not be assumed that every physical ailment of an employee was intended to require an administrative decision with respect to whether it contributed to the consequences of a subsequent industrial injury. And in the absence of compelling evidence, Congress should not be presumed to have provided an exemption from substantial liabilities under the Act without some precise indication of the scope of the exemption. Not only will the allowance of such claims to reduced compensation create a departure from existing law (see cases cited pp. 17, 20–21, *infra*), but the duty of apportioning disabilities between injuries and prior ailments may prove an impossible one.[3] Cf. *Schurick* v. *Bayer Co.*, 272 N. Y. 217.

The broad construction of "previous disability" by the court below is also in conflict with decisions of the federal courts dating from the

[3] Some indication of the breadth of the term "disability," if the statutory definition be rejected, may be gleaned from its meaning in other contexts. In the administration of veterans' legislation, for example, virtually every physical disorder is considered a "disability" including such ailments as neuropsychiatric diseases, tuberculosis, bronchial asthma, gastric or duodenal ulcer, skin diseases, phlebitis, organic diseases of the heart, arthritis, and all the various communicable and infectious diseases and their residuals. Administrator of Veterans' Affairs, Annual Report (1947), p. 20; Ti. 38 CFR 1943 Cum. Supp. §§ 2.1100, 2.1137, 2.1172.

early days of the Longshoremen's and Harbor Workers' Compensation Act. *National Homeopathic Hospital Association* v. *Britton,* 147 F. 2d 561 (App. D. C.), certiorari denied, 325 U. S. 857; *Grays Harbor Stevedore Co.* v. *Marshall,* 36 F. 2d 814 (W. D. Wash.); *Liberty Stevedoring Company* v. *Cardillo,* 18 F. Supp. 729 (E. D. N. Y.); *Wood Preserving Corp.* v. *McManigal,* 39 F. Supp. 177 (W. D. Ky.); *Seime-Spokane Co.* v. *Marshall,* Civil Action No. 640 (W. D. Wash.), decided April 1, 1943, not reported; *Temperance River Co.* v. *LaGarde,* 65 F. Supp. 161 (D. Minn.). These decisions all involved situations in which an industrial injury in combination with a preexisting physical impairment resulted in a greater disability than the subsequent injury alone would have produced.

In the *National Homeopathic* case, the court held that Section 8 (f) (1) did not apply unless the prior physical defect resulted from an accidental injury arising out of and in the course of employment. The court reached this conclusion by interpreting "previous disability" in Section 8 (f) in accordance with the definitions contained in Section 2 of the Act. In the remaining cases, the courts also held the prior physical defect not to be a "previous disability" within the meaning of Section 8 (f) and refused to abate the employer's liability for the full consequences of the injury.

The construction of "previous disability" which we urge finds support not only in these federal court decisions but also in decisions of the state courts of New York interpreting a comparable relieving provision in its workmen's compensation law before its amendment in 1944.[4] These decisions consistently refused to reduce the employer's liability where a previous physical impairment existed which was "not caused by an industrial accident." *LaBelle* v. *Britton Stone & Supply Corp.*, 247 App. Div. 843; *Van Ooteghem* v. *Sisters of the Good Shepherd*, 249 App. Div. 898; *Bervilacqua* v. *Clark*, 225 App. Div. 190, affirmed, 250 N. Y. 589; *Pyshnack* v. *Henry Forge & Tool, Inc.*, 272 N. Y. 546, affirming 247

[4] The New York statute has frequently been referred to as the model for the federal law. See, *e. g.*, H. Rep. 1357, 70th Cong., 1st sess., p. 2; *Hartford Accident & Indemnity Co.* v. *Hoage*, 85 F. 2d 411 (App. D. C.); *Employers' Liability Assur. Corp., Ltd.* v. *Monahan*, 91 F. 2d 130 (C. C. A. 1); *Luckenbach S. S. Co., Inc.* v. *Marshall*, 49 F. 2d 625 (D. Ore.). New York Workmen's Compensation Law, Section 15 (7), prior to the 1944 amendments, provided as follows: "The fact that an employee has suffered *previous disability* or received compensation therefor shall not preclude him from compensation for a *later injury* nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a *previous disability* shall not receive compensation for a *later injury* in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability." [Italics supplied.]

App. Div. 842; *Finegan* v. *Mintern & Son*, 270 App. Div. 868; with *Schurick* v *Bayer Co.*, 272 N. Y. 217, compare *Anderson* v. *Babcock & Wilcox Co.*, 256 N. Y. 146. But cf. *Lehman* v. *Schmahl*, 179 Minn. 388.

The force of the statutory terms and the context of the provisions, together with the consistent interpretations of the courts, would seem to furnish sufficient basis to reject the expanded scope which the decision of the court below gives to Section 8 (f). Additional reasons for avoiding such a construction of the exemption, however, are to be found in the fundamental purpose of workmen's compensation legislation.

II

ADHERENCE TO THE EXPRESS STATUTORY DEFINITION OF "PREVIOUS DISABILITY" ACCORDS WITH THE POLICY OF WORKMEN'S COMPENSATION LEGISLATION

A. By giving extended scope to the phrase "previous disability" in Section 8 (f), thereby expanding the area of the employer's freedom from liability, the court below created the danger of requiring employees to assume a substantial part of the costs of industrial accidents—a result which is in direct conflict with the purpose of workmen's compensation legislation to relieve employees of these burdens. *National Homeopathic Hospital Ass'n* v. *Britton*, *supra* at 564. The court's interpretation also constitutes a departure,

not justified by the statutory language, from accepted standards of legal responsibility.

The limitation of an employer's liability because of a preexisting physical ailment, which is the effect of the decision below, is contrary to the usual rule of liability in tort and under workmen's compensation laws. *Restatement of Torts, Negligence*, § 461; Harper, *Law of Torts* (1933), §§ 113, 129, 214. Under this and other workmen's compensation statutes, the courts have frequently rejected as a defense to a compensation award an employee's prior physical infirmity. This has been so where the subsequent disability would not have occurred but for the prior physical defect (*Pacific Employers' Ins. Co.* v. *Pillsbury*, 61 F. 2d 101 (C. C. A. 9); *Hoage* v. *Employers' Liability Assurance Corp.*, 64 F. 2d 715 (App. D. C.), certiorari denied, 290 U. S. 637; *Commercial Casualty Insurance Co.* v. *Hoage*, 75 F. 2d 677 (App. D. C.), certiorari denied, 295 U. S. 733; *Hoage* v. *Royal Indemnity Co.*, 90 F. 2d 387 (App. D. C.), certiorari denied, 302 U. S. 736), and where the extent of the disability has been increased because of the previous disability. *Warlop* v. *Western Coal & Mining Co.*, 24 F. 2d 926 (C. C. A. 8); *New Amsterdam Casualty Co.* v. *Cardillo*, 108 F. 2d 492 (App. D. C.); *Great Atlantic & Pacific Tea Co.* v. *Cardillo*, 127 F. 2d 334 (App. D. C.).

In many cases presenting factual situations virtually identical with that in the instant case,

where the employee had previously lost the use of one eye or some other member and thereafter lost the remaining member in an industrial accident, the employer has been held liable for compensation for total and permanent disability. See, *e. g., Killisnoo Packing Co.* v. *Scott,* 14 F. 2d 86 (C. C. A. 9); *Moore* v. *Western Coal Mining Co.,* 124 Kans. 214; *Liptak* v. *Industrial Accident Comm. of California,* 200 Cal. 39; *In re Braconnier,* 223 Mass. 273; *Wabash Railway Co.* v. *Industrial Commission,* 286 Ill. 194; *Nease* v. *Hughes Stone Co.,* 114 Okla. 170. The rationale of these decisions is that the employee was using in his employment whatever earning capacity he enjoyed at the time. This capacity may have been reduced by the prior loss of an eye or leg or by some other infirmity. Presumably reduced efficiency would be reflected in reduced earnings. The industrial accident completely and permanently destroyed this remaining earning capacity and it was for the complete loss of this earning capacity that the employer was held liable in accordance with the usual principles of compensation legislation. The award, of course, would be based on the employee's earning capacity at the time of injury. The results reached in these cases reflect the general policy of workmen's compensation statutes that industry rather than the individual workman should bear the burden of industrial accidents. See Dodd, *Administration of Workmen's Compensation* (1936), pp. 664, 674.

An expanded interpretation of Section 8 (f) creates the real possibility that many of these burdens will be reimposed on employees by threatening the solvency of the Section 44 fund to which employees must turn for complete compensation in permanent total disability cases (Section 8 (f) (1)) and by broadening the present extremely limited scope of all other combined disability cases in which no provision is made for paying employees the compensation from which the employer is relieved. Section 8 (f) (2).

The provision of Section 8 (f) (1) for additional payments from the special fund in cases of permanent total disability may prove inadequate to protect the employee because of the threat to the fund's solvency which the additional burdens resulting from a liberal reading of the term "previous disability" may create. See *National Homeopathic Hospital Ass'n v. Britton*, 147 F. 2d at 564. The resources of the special fund available for additional compensation are limited. The fund consists principally of payments of $1,000 as compensation for the death of employees from injury where there is no person entitled to compensation for this death. Section 44 (c). Only one-half of the no-dependency death payments made into the fund are available for additional compensation under Section 8 (f). Section 44 (c) (1). Neither the United States nor the Administrator is liable for any of the charges

against the fund authorized by Section 8 in excess of the amount actually deposited in the fund. Section 44 (c). The danger of exhaustion has been increased by the recent amendment to the Act which removed the $7,500 maximum payment limitation. Act of June 24, 1948, Pub. Law No. 757, 80th Cong., 2d sess. The balance in the fund on June 30, 1948, was $579,527.11. During the year ending June 30, 1948, $30,544.17 was paid into the fund. Only half of these amounts are available for subsequent injury payments. The danger of exhausting second injury funds where, as in the instant case, contributions consist principally of $500 no-dependency death payments and the claims which may be made against the funds are not specifically circumscribed has been recognized by workmen's compensation experts. United States Division of Labor Standards, Second Injury Funds as Employment Aids to the Handicapped (1947), p. 2; International Association of Industrial Accident Boards Bulletin No. 1, Discussion of Industrial Accidents and Diseases (1944), pp. 19, 199, 202. See discussion p. 32, *infra*.

The likelihood of imposing the burdens of industrial accidents on employees by enlarging the meaning of "previous disability" appears more clearly with respect to Section 8 (f) (2). That section contains no provision for additional compensation to the employee and any reduction in

the employer's liability must be borne by the employee. Although Section 8 (f) (2) is not directly involved in the present case, the term "previous disability" obviously must have the same meaning in both subsections of Section 8 (f). Hence it is relevant in construing Section 8 (f) (1) to consider the implications with respect to Section 8 (f) (2). As previously indicated, Section 8 (f) (2) provides that in all cases in which an employee receives an injury following a previous disability, except those covered by Section 8 (f) (1), "the employer shall provide compensation only for the disability caused by the subsequent injury." Thus in cases of all injuries, which together with previous disabilities, result in disabilities less than permanent and total, the deputy commissioner is required to determine whether the previous disability increased the disability resulting from the subsequent industrial injury and to eliminate this increase from the compensation award. The employee is required to bear the burden of any excess loss in earning capacity resulting from the combination of the two disabilities. Under the interpretation of the term "previous disability" as restricted to one resulting from prior industrial accidents, we are advised by the Bureau of Employees' Compensation that practically no cases involving Section 8 (f) (2) have arisen. Acceptance of the broad interpretation

employed by the court below, however, will open the door wide to possible employer defenses based on Section 8 (f) (2) in the event of any pre-existing physical infirmity and result in the imposition of increased burdens on injured employees.

Since this result departs from the usual rule of compensation for industrial injury and operates contrary to the workmen's compensation principle of relieving employees of the burdens of industrial accidents, it should not be reached unless required by the clear mandate of the statute or by other compelling factors. Cf. *National Homeopathic Hospital Ass'n* v. *Britton*, 147 F. 2d 561, 564 (App. D. C.); *Liptak* v. *Industrial Accident Commission*, 200 Cal. 39; *Phillips Co.* v. *Walling*, 324 U. S. 490, 493; *Piedmont & Northern Railway Company* v. *Interstate Commerce Commission*, 286 U. S. 299, 311.

B. The evidence available from the legislative background of Section 8 (f) indicates little more than that the statute was based upon other workmen's compensation legislation, particularly the New York statute (H. Rep. No. 1190, 69th Cong., 1st sess., p. 2; Hearings before Senate Subcommittee on the Judiciary on S. 3170, 69th Cong., 1st sess., pp. 31, 33, 35, 36, 48; H. Rep. No. 1767, 69th Cong., 2d sess., p. 20), and that Section 8 (f) was probably intended to serve the same general purpose of encouraging the employment of the

handicapped as second injury provisions served in other statutes. Senate Hearings, at 36, 43; Hearings before the House Committee on the Judiciary on H. R. 9498, 69th Cong., 1st sess., pp. 172, 173, 208. The explanation for incorporating second injury provisions in the statute offered by a witness in behalf of the federal legislation is that "they have become a commonplace * * * in State compensation legislation and ought to be included in the Act." Hearings before Senate Subcommittee, *op. cit. supra*, p. 43. We may appropriately refer, therefore, to the second injury provisions in other statutes and to the evaluations made by administrative experts in the field for guidance with respect to the manner in which opposing policy considerations have been resolved.

Resort to these sources furnishes persuasive evidence that the policy of encouraging employment of handicapped workers was not intended to override the fundamental purpose of workmen's compensation legislation to free employees of the

[5] The statement of another witness of the purpose of the fund to protect a one-eyed worker from being denied employment as an "extra risk" and to protect the employer from liability for permanent total disbility upon the loss of one eye. (Hearings before House Committee, *op. cit. supra*, p. 208) merely illustrates the general purpose to encourage employment of the handicapped and throws no light upon the specific problem we have here as to whether this purpose was not limited to those handicapped persons who were within the statutory terms.

burdens of industrial accidents. Accordingly, second injury funds were established to guarantee that the employee's compensation would not be reduced notwithstanding the curtailment of the employer's liability by "previous disability" provisions. Moreover, the danger of the financial insolvency of these funds which would threaten full compensation to employees, and the delays in payment which accompany vague provisions have led to the conclusion that second injury provisions should be kept within well-defined limits notwithstanding the possible elimination of some physical handicaps from their scope. There is also reason for believing that the coverage of compensation risks by insurance dilutes the necessity for encouraging employers to hire handicapped workers. Application of these considerations to the instant case points to the necessity of precisely circumscribing "previous disability" by the statutory definitions and of avoiding the vague scope which rejection of the definitions would entail.

There seems little question that the predominant reason for the introduction of provisions reducing an employer's liability for second injuries was to remove obstacles to the employment of handicapped persons. It was believed that employers' reluctance to hire handicapped individuals stemmed from the fear that an industrial injury might subject the employer to much greater liability than a similar injury to an em-

ployee in normal physical condition. National Industrial Conference Board, Workmen's Compensation Acts in the United States: The Medical Aspect (1923), p. 128; United States Bureau of Labor Statistics Bulletin No. 577, Proceedings of the 19th Annual Meeting of the International Association of Industrial Accident Boards and Commissions (1933), p. 147; United States Division of Labor Standards Bulletin No. 94, 1947 Convention of the International Association of Industrial Accident Boards and Commissions (1948), p. 111; United States Division of Labor Standards, Second Injury Funds as Employment Aids to the Handicapped (1947), p. 1; Dodd, *op. cit. supra,* p. 666; Kessler, *The Crippled and the Disabled* (1935), pp. 111–112.

The second injury provisions were intended to minimize these fears. However, the overwhelming majority of workmen's compensation experts recognized the need of meeting this problem without compromising the basic principles of imposing upon industry and society, rather than upon the injured employee, the burden of industrial accidents. Whatever earning capacity the injured employee had was either reduced or eliminated by the subsequent industrial accident and under the generally accepted principles of workmen's compensation legislation, it was to society's advantage, as well as for the individual's benefit, to have the employee's compensation computed on

the basis of the economic loss that he had in fact sustained regardless of his physical condition at the time he sustained it. The importance attached to fully compensating the employee is evidenced by the criticism of those few statutes which attempted to meet the problem of the handicapped worker by permitting a waiver of compensation for additional liability attributable to his handicap. United States Bureau of Labor Statistics Bulletin No. 577, *op. cit. supra*, p. 149; United States Bureau of Labor Statistics Bulletin No. 564, Proceedings of the 18th Annual Meeting of the International Association of Industrial Accident Boards and Commissions (1932), p. 277; Dodd, *op. cit. supra*, p. 678.

Accordingly, second injury funds were provided out of which the employee was to be paid the compensation from which his employer had been relieved. United States Division of Labor Standards Bulletin No. 94, *op. cit. supra*, p. 200; United States Bureau of Labor Statistics Bulletin No. 577, *op. cit. supra*, pp. 152, 157; United States Division of Labor Standards, Second Injury Funds as Employment Aids to the Handicapped (1947), p. 1; Dodd, *op. cit. supra*, pp. 666, 671–672, 674; United States Bureau of Labor Statistics Bulletin No. 602, Discussions of Industrial Accidents and Diseases at the 1933 Meeting of the International Association of Industrial Accident Boards and Commissions (1934), p. 15;

United States Bureau of Labor Statistics Bulletin No. 536, Proceedings of the 17th Annual Meeting of the International Association of Industrial Accident Boards and Commissions (1931), pp. 250, 252, 269; Council of State Governments, Suggested State Legislation Program for 1947, pp. A50–A51. It is thus apparent that concern for the handicapped was not intended, as a general matter, to override other basic concepts of compensation legislation. Similarly, as we shall show, it was considered advisable to limit the special provisions designed to encourage employment of handicapped workers to situations which would not undermine effective administration of the compensation system.

Notwithstanding their more limited application, specific type second injury provisions, comparable to that which would be achieved by interpreting Section 8 (f) in accordance with the statutory definitions, are deemed adequate to meet the problem of the handicapped worker (United States Division of Labor Standards, Second Injury Funds as Employment Aids to the Handicapped (1947), pp. 4, 7; United States Bureau of Labor Statistics Bulletin No. 536, *op. cit. supra,* p. 258) and are recommended by those experienced in the administration of workmen's compensation laws because they avoid the possible sacrifice of important compensation principles.

The majority of second injury or subsequent disability laws "either enumerate the types of

preexisting disabilities or confine second-injury coverage to disabilities incurred as a result of an industrial accident. The enumerated preexisting disabilities are usually confined to the loss or disability of a member, such as an eye, ear, hand, foot, leg." United States Division of Labor Standards Bulletin No. 94, 1947 Convention of the International Association of Industrial Accident Boards and Commissions (1948), p. 104. In 1933 the recommendation of the Committee on Workmen's Compensation Legislation adopted by the International Association of Industrial Accident Boards and Commissions was for a second injury provision specifically limited to cases involving a prior "accidental injury." United States Bureau of Labor Statistics Bulletin No. 602, *op. cit. supra*, p. 11. The recommended draft of a second injury fund provision adopted by the Association in 1944 also embodied a precisely defined coverage applicable only if the prior injury resulted in the loss of a hand, an arm, foot, leg, or an eye and the subsequent injury resulted in permanent and total incapacity. International Association of Industrial Accident Boards and Commissions, Bulletin No. 1, Discussion of Industrial Accidents and Diseases (1944), p. 199. A specific type provision was also recommended by the Council of State Governments in its legislative program for 1947. This draft, which was identical with that proposed by the Association, was also sponsored by the United States Depart-

ment of Labor and the Bureau of Employees Compensation in the Federal Security Agency. Council of State Governments, *op. cit. supra*, pp. A51–A54.

The Government's desire to avoid a construction of Section 8 (f) which would convert it into a vague provision without specific boundaries is thus adequately supported. The reasons for advocacy of provisions with precisely defined coverage have been well documented. "A vague or complicated type of provision which appears to cover all conditions and exigencies breaks down in operation." Council of State Governments, *op. cit. supra*, p. A51. Thus "in the few instances when a second-injury fund has encountered temporary financial difficulty, the main source of trouble has usually been the vagueness of the legislation, inadequate arrangement for defending claims against the fund, too small an assessment for supporting a fund of the type that was proposed, or all of these causes." United States Division of Labor Standards, Second Injury Funds as Employment Aids to the Handicapped (1947), p. 2. The adoption of legislation which was not "simple and specific" has resulted in "a rush of claims, administrative delays in paying claims, and the threatened or actual insolvency of the fund." *Id.* at p. 8. The "serious difficulties of financing and administration" which will follow when the compensation act requires wholesale allocations of disabilities between undefined prior physical ail-

ments and subsequent injuries have received general recognition. See International Association of Industrial Accident Boards Bulletin No. 1, *op. cit. supra*, pp. 20, 17, 19, 201–202; Kessler, *op. cit. supra*, p. 116; United States Bureau of Labor Statistics Bulletin No. 577, *op. cit. supra*, pp. 155, 157; Dodd, *op. cit. supra*, pp. 678–679; United States Bureau of Labor Statistics Bulletin No. 536, *op. cit, supra*, pp. 261–262.

The willingness to give but limited scope to the policy of encouraging the employment of handicapped workers by second injury provisions may also be influenced by the fact that most employments are covered by insurance, and that insurance rates are not based upon the character of workers employed but upon the hazard of the occupation. Association of Casualty and Surety Executives, The Physically Impaired Can Be Insured Without Penalty; Association of Casualty and Surety Executives, The Employment of Disabled War Veterans and Other Disabled Persons (1944), p. 3; United States Division of Labor Standards, Second Injury Funds as Employment Aids to the Handicapped (1947), p. 7. According to statistics maintained by the Bureau of Employees' Compensation, Federal Security Agency, for the year ending June 30, 1948, eighty-five per cent of the cases which arose under the Longshoremen's and Harbor Workers' Act were covered by insurance. There were only 268 self-insurers throughout the country. Thus, employer

reluctance to hire the handicapped may be of little consequence because of the widespread use of insurance. Limitation of the coverage of second injury provisions, therefore, does not necessarily represent any substantial sacrifice of the principle of encouraging the employment of the handicapped.

In view of the serious problems created, an indefinite second injury fund should not be implied in the absence of a clear congressional mandate. The legislative history of the provision here in question does not disclose an intent to make the statutory definitions, which establish precise boundaries, inapplicable to the phrase "previous disability." Moreover, the administrative interpretation embodied in the deputy commissioner's award, based upon experience in dealing with the problems under the Act, should not be overturned if it "is not forbidden by the law." *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 478; *Unemployment Commission* v. *Aragon*, 329 U. S. 143; *Labor Board* v. *Hearst Publications*, 322 U. S. 111, 131. Accordingly, the phrase "previous disability" in Section 8 (f) should be interpreted in the light of the statutory definitions. The exemption, properly construed, is applicable only where an employee's physical incapacity results from a prior industrial accident for which, presumably, he has received some compensation. In disregarding the statutory definitions of "disability" and "injury" and holding

in effect that the employer's liability must be reduced wherever an employee's physical defect, regardless of its nature or origin, increases the extent of the disability, the court below appears to have extended the exemption beyond the limits marked by Congress.

CONCLUSION

It is respectfully submitted that the judgment of the courts below should be reversed.

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OCTOBER 1948.

APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. 901, *et seq.*, provides, in part, as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

* * * * *

COMPENSATION FOR DISABILITY.

SEC. 8. Compensation for disability shall be paid to the employee as follows:

* * * * *

(f) Injury increasing disability: (1) If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a pre-

vious disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability cause by the subsequent injury: *Provided, however*, That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44.

(2) In all other cases in which, following a previous disability, an employee receives an injury which is not covered by (1) of this subdivision, the employer shall provide compensation only for the disability caused by the subsequent injury. In determining compensation for the subsequent injury or for death resulting therefrom, the average weekly wages shall be such sum as will reasonably represent the earning capacity of the employee at the time of the subsequent injury.

* * * * * *

REVIEW OF COMPENSATION ORDERS

SEC. 21. * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

SPECIAL FUND

SEC. 44. (a) There is hereby established in the Treasury of the United States a special fund for the purpose of making payments in accordance with the provisions of subsections (f) and (g) of section 8 of this Act. * * *.

* * * * *

(c) Payments into such fund shall be made as follows:

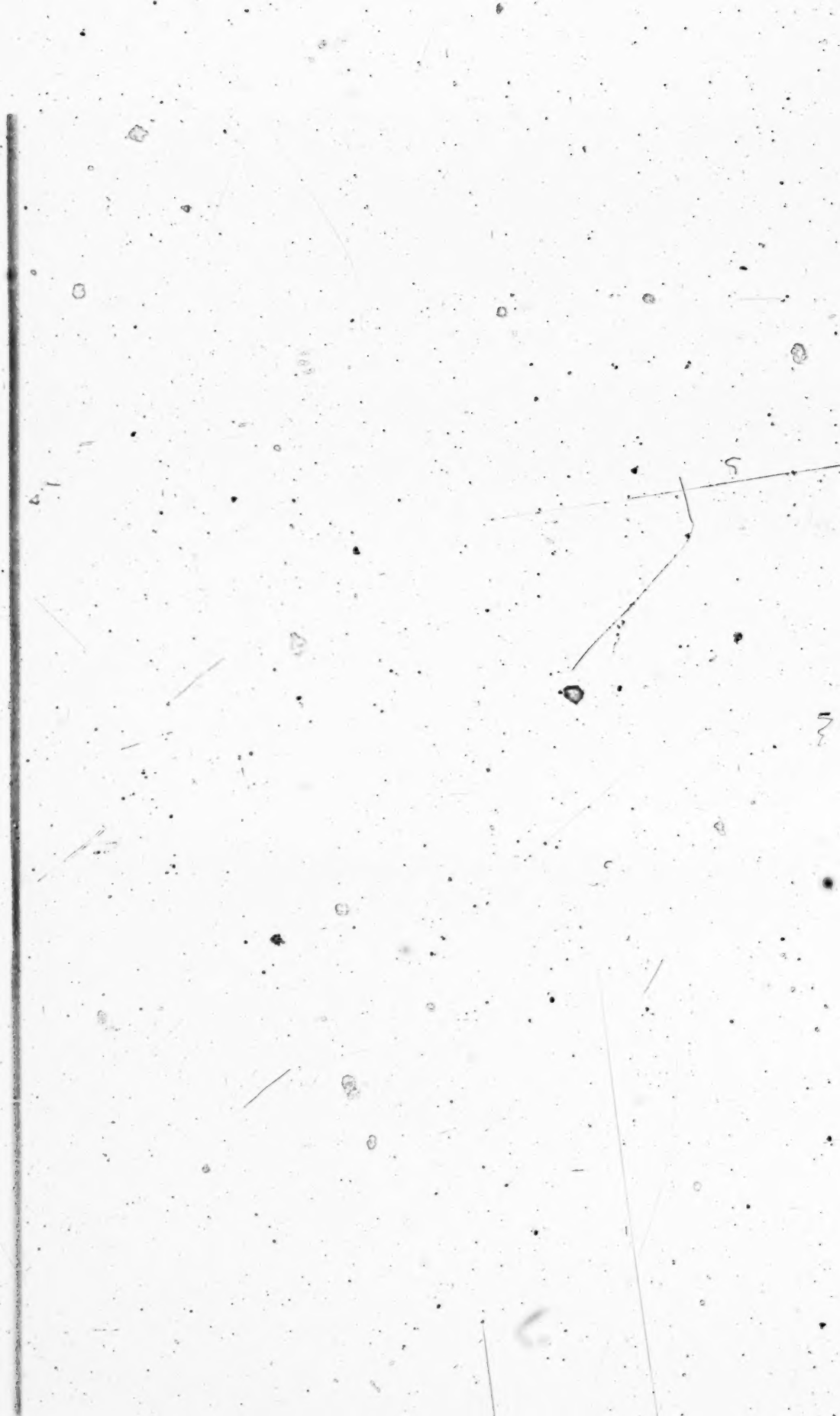
(1) Each employer shall pay $1,000 as compensation for the death of an employee of such employer resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for ~~such death~~. Fifty per ~~centum~~ of each such payment shall be available for the payments under subdivision (f) of section 8, and 50 per centum shall be available for payments under subdivision (g) of section 8.

(2) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

* * * * *

(g) All civil penalties provided for in this Act shall be collected by civil suit brought by the commission.

U. S. GOVERNMENT PRINTING OFFICE: 1948



Supreme Court of the United States

No. ~~806~~. 56

OCTOBER TERM, ~~1947~~. 1948

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER, SIXTH COMPENSATION DISTRICT, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER,

VS.

SUWANNEE FRUIT & STEAMSHIP COMPANY, A CORPORATION, AND FIDELITY & CASUALTY COMPANY OF NEW YORK.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

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OCTOBER TERM, 1947.

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER, SIXTH COMPENSATION DISTRICT, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER,

VS.

SUWANNEE FRUIT & STEAMSHIP COMPANY, A CORPORATION, AND FIDELITY & CASUALTY COMPANY OF NEW YORK.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

The Respondents will be referred to as such or as the employer and the carrier, and the Petitioner will be referred to as the Commissioner. References to the Record are by number in parentheses.

STATEMENT OF THE CASE.

The Respondents assert that the Commissioner in his brief has not stated the question accurately. The question is best stated in the language of the trial court (R. 10):

> "The sole and narrow question here is whether the present employer, Suwannee, is liable for TOTAL permanent disability, or whether said employer is liable only for the maximum compensation for PARTIAL permanent disability, the remainder to be paid out of the special fund created by Sec. 44 of the Act, 33 U. S. C. A. 944."

Or it may be stated as set forth in the opinion from the Circuit Court of Appeals, Fifth Circuit (R. 21):

> "The sole question with which we are concerned is whether the employer, Suwannee Fruit and Steamship Company, is liable for compensation to its employee, Davis, for permanent total disability, under provisions of the Longshoremen's and Harbor Workers Compensation Act, 33 U. S. C. A., Sec. 908(a), or whether it is liable only for permanent partial disability, with the remainder of the allowed compensation to be paid out of the special fund created by Section 44 of the Act, 33 U. S. C. A. 944."

It has never been disputed by anyone that the employee was industriously totally disabled. The parties disagree as to who is liable for the payment of permanent disability. The employer and carrier contend that by section 908(f) they are relieved from liability for total disability, and only required to provide compensation for permanent partial liability, which compensation has been provided. The Respondents assert that the clear language of Section 8(f) of the Act fixes liability for these payments upon the special fund set up by the Act. Both the District Court and the Circuit Court of Appeals agreed with Re-

spondents' argument. The answer to the question can be found in the specific provision of the Act which we quote for convenience:

> "Injury Increasing Disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury; * * *" (It is provided, however, the employee is paid for permanent total disability but the payments come from the special fund, not from the employer.)

This language read in its ordinary sense can have but one meaning. It is unambiguous and it needs no construction. An intent on the part of Congress is clearly expressed to relieve the employer from liability for a disability which does not arise from an injury by accident in the employment. This intent is irrefutably demonstrated by the report from the Congressional Committee dealing with this particular section. A spokesman at the Congressional hearing in advocating the quoted language, said:

> "The second injury proposition is as much to the advantage of the employer and his interest as it is for the benefit of the employee. It protects that employer who has hired, say a one-eyed worker who goes and loses his other eye and becomes a total disability. The employer without this sort of thing (*i. e.* the exception clause) would have to pay total permanent disability compensation. Then, on the other hand, this also protects the worker with one eye from being denied employment on account of being an extra risk. Now, by simply taking this up in this way it is possible to protect both the employer and to protect the one-eyed employee also * * *" (Book I, House Committee Hearings, before Committee on Immigration, Naturalization and Insular Affairs, Interstate and Foreign Commerce, Irrigation and Reclamation, Judiciary, 1926, Vol. 438).

The Committee dealt with a factual situation identical with that presented to the District Court and to the Fifth Circuit Court of Appeals. The Commissioner's theory is based upon the fallacious assumption that a definition of disability should be read into this section 8(f) where the words "previous disability" and "subsequent injury" are used. Both the District Court and the Circuit Court of Appeals disagreed with this contention for the announced reason that such an interpolation leads to an anomaly and to a construction directly in the teeth of the expressed intention of the meaning before the Committee considering the Act. The purpose of this act was to relieve employers from compensation for disabilities not caused by the employment. To give it the strained construction urged by the Commissioner, is to distort its true sense and meaning.

The Commissioner's argument likewise overlooks the general intent of the Act which is to compensate for injuries caused by industry. Section 902(2) of the Act, 33 U. S. C. A., defines injury as meaning "the accidental injury or death arising out of and in the course of the employment * * *." This clearly indicates that compensation is to be paid only for something that happened in the course of the employment. Congress did not seek to legislate compensation benefits for disability that did not arise out of the employment. If the Commissioner's argument is given force, the employer is required to pay for a disability which did not arise out of the employment. The intent of Congress controls. *U. S. v. Ryan*, 284 U. S. 167, 76 L. Ed. 224.

Authorities Cited by Commission.

Reliance is had by the Commissioner (his brief, page 6) upon *National Homeopathic Hospital Association* v. *Britton*, 147 F. 2d 561, certiorari denied 325 U. S. 857. The trial court was unable to follow the interpretation of that

opinion as adopted by the majority of the court (R. 10). It agreed with the dissenting opinion of Chief Justice Groner. Likewise the Circuit Court of Appeals adopted the reasoning of the dissenting opinion (R. 23). This decision has not been accepted as an authority. The other cases cited on page 6 of the Commissioner's brief likewise do not support his position. The Grays Harbor case does not deal with our question at all, but with the aggravation of a pre-existing disease. That factual situation is utterly different. The Liberty Stevedoring Company case dealt with an injury to a deformed member and not with our problem, the court saying with reference to the issue now presented:

> "This issue was not raised before the Commissioner and cannot be raised for the first time in this suit as it would be considered as having been waived * * *"

It was also stated that section 8(f) had no application. No interpretation of this section was attempted. The Temperance River Company case is no authority because it erroneously assumed that the refusal to grant certiorari in the National Homeopathic Hospital case was an approval of that case. The Wood Preserving Corporation case expressly held that Section 8(f) of the Act was not applicable. "Accordingly, the case is not governed by Section 8(f) of the Act * * *"

New York Cases: At page 10 of the Commissioner's brief, he refers to the applicability of New York decisions. Judge Groner in his dissenting opinion disposed of this argument:

> "I have carefully considered the Board's argument that the view expressed is not sustained by the New York compensation cases under the New York law, and several intermediate court decisions are cited to sustain this assertion. But an examination of these cases

discloses that none of them decides the precise point we have here. Besides, the language of the New York and the Federal Acts discloses marked differences."

Confusion of Aggravation of a Diseased Condition with a Separate Injury: The Commissioner places reliance, through analogy upon cases dealing with aggravation of a pre-existing condition. But there is no such analogy. The aggravation of an existing condition by injury is only compensable if the injury arises out of the employment, then the effect of that injury on the pre-existing condition is compensable. But such cases have never held that compensation is payable because the pre-existing diseased condition did not arise *in industry*. But when the diseased condition is not affected directly by the injury, the diseased condition is not taken into effect. Our case does not present the aggravation of a diseased condition. The diseased condition continues as it was. The impairment the man had continues as it was and the injury for which compensation was paid had no effect upon it. Compare *Kupiak* v. *Briggs Manufacturing Co.*, 286 Mich. 329, 282 N. W. 427; *Houg* v. *Ford Motor Co.*, 288 Mich. 478, 285 N. W. 27.

At page 12 the Commissioner cites cases in which he states compensation has been allowed under similar circumstances, but these decisions do not bear him out. For instance in *Killisnoo Packing Co.* v. *Scott*, 14 F. 2d 86, an interpretation of section 8(f) was not involved. The court was determining whether total disability compensation should be paid. We have no dispute on that. Our dispute is the determination of the payor. In many cases from other states, the Commissioner's theory has been repudiated and, in our opinion, the view he asserts has only the support of a minority. See 24 A. L. R. 1467; 73 A. L. R. 711; 99 A. L. R. 1505; 142 A. L. R. 822; *Lente* v. *Lucci*, (Pa.) 119 Atl. 132, 24 A. L. R. 1462; *Catlett* v. *Chattanooga Handle Co.*, 165 Tenn. 343; 55 S. W. 2d 257; *Cain* v. *Staley Mfg. Co.*,

97 Ind. App. 235, 186 N. E. 265; *Lehman* v. *Shmahl*, 179 Minn. 388, 299 N. W. 553.

CONCLUSION.

The Circuit Court of Appeals for the Fifth Circuit accurately interpreted the Act (R. 22).

> "Section 8(f) of the Act is clear and unambiguous, and therefore needs no construction. When read in its ordinary sense it can have but one meaning. It was clearly intended to restrict the liability of employers to only those employees disabled as a result of accidental injury sustained during their employment. Congress, in passing this section of the Act, intended to relieve industry from compensation for disabilities not caused by it. To give to Section 8(f) of the Act the strained and ingenious construction urged by the Commissioner is but to distort its true sense and meaning. *U. S.* v. *Ryan*, 284 U. S. 167. When we come to use the phrases 'previous disability,' and 'subsequent injury,' in Section 8(f), they should be construed in their plain and ordinary sense, and one which produces a consistent and logical result. To interpolate into this section the defined meaning of those terms from Section 2 alone leads to an anomaly. We can give to this section no reasonable construction which would make an employer liable for *total disability* where a previous injury *was not* received in the course of employment, and yet to make him liable only for *partial disability* where the previous injury *was* received in the course of employment."

For the foregoing reasons, ably stated by the Court, the petition for the writ should be denied.

HARRY T. GRAY,
SAM R. MARKS,
Attorneys for Respondents.

MARKS, MARKS, HOLT, GRAY & YATES,
Of Counsel.

No. 56

In the Supreme Court of the United States

October Term, 1948

56

RICHARD P. LAWSON, As Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission,

Petitioner,

vs.

SUWANNEE FRUIT & STEAMSHIP COMPANY, A Corporation, and FIDELITY & CASUALTY COMPANY OF NEW YORK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Brief for the Respondents.

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In the Supreme Court of the United States

October Term, 1948

No. 56

RICHARD P. LAWSON, As Deputy Commissioner, Sixth Compensation District, United States Employees' Compensation Commission,

Petitioner,

vs.

SUWANNEE FRUIT & STEAMSHIP COMPANY, A Corporation, and FIDELITY & CASUALTY COMPANY OF NEW YORK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENTS.

The respondents, Suwannee Fruit & Steamship Company, and Fidelity & Casualty Company of New York, will be referred to as the Employer and the Carrier, respectively, and the Petitioner will be referred to as the Commissioner.

STATEMENT OF THE CASE

It is not thought the Commissioner's brief (page 2) adequately presents the question to be decided. It may best be stated in the language of the District Court (R. 10):

> "The sole and narrow question here is whether the present employer, Suwannee, is liable for TOTAL permanent disability, or whether said employer is liable only for the maximum compensation for PARTIAL permanent disability, the remainder to be paid out of the special fund created by sec. 44 of the Act, 33 U. S. C. A. 944."

The question was stated substantially the same way in the opinion of the Fifth Circuit Court of Appeals (R. 21):

> "The sole question with which we are concerned is whether the employer, Suwannee Fruit and Steamship Company, is liable for compensation to its employee, Davis, for permanent total disability, under provisions of the Longshoremen's and Harbor Workers' Compensation Act, * * * or whether it is liable only for permanent partial disability, with the remainder of the allowed compensation to be paid out of the special fund created by Section 44 of the Act, 33 U. S. C. A. 944."

We propose to argue the question as submitted and in doing so, to answer the contentions made in the Commissioner's brief.

SUMMARY OF ARGUMENT

The whole case turns on the interpretation of Section 8 (f) (1) of the Longshoremen's and Harbor Worker's Compensation Act. Our argument may be summarized:

(a) The wording of the section is clear and unambiguous; it needs no construction, or interpretation. When the section is read, giving the words their ordinary meaning, it can have but one interpretation—(the meaning given it by the District Court and the Circuit Court of Appeals)—which is in accord with the intent of Congress and the purposes of the Act to provide benefits only for injury in employment.

(b) The New York decisions relied upon by the Commissioner are not decisive because of the differences in the language of the statutes involved; but even the New York

cases sustained the interpretation given by the Fifth Circuit Court of Appeals.

(c) The speculative predictions of the effect on the Special Fund and the inadequacy of the Fund are matters that should be directed to the attention of Congress rather than to this Court.

ARGUMENT

It has never been disputed by anyone that the employee has become totally and permanently disabled industrially, nor that he should be paid compensation benefits for total and permanent disability. The case presents an issue as to the source from which these payments should come. Should they be paid by the employer or should they be paid from the Special Fund created by Congress after the employer has paid, as it has, for the permanent partial disability resulting from the injury arising out of and in the course of the employment, in which the employee was engaged with the respondent? Respondent's position is these payments should be made from the Special Fund. This position has been taken by reason of the plain language of the section involved. It (33 U.S.C.A. 908 (f) (1) provides:

> "Injury increasing disability: (1) If an employee receives an injury which of itself would only cause partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: *Provided, however,* That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in Section 944 of this chapter."

This language, as everyone concedes, read in its ordinary sense, leaves nothing for construction. An intent on the part of Congress, to relieve employers from compensation liability payable for a disability which did not arise from an injury by accident in their employment, is clearly expressed. Reasons for this Congressional intent are found in a report of Congressional hearings. We quote from a report of a hearing at which the quoted section was considered:

> "The second injury proposition is as much to the advantage of the employer and his interest as it is for the benefit of the employee. It protects that employer who has hired, say a one-eyed worker who goes and loses his other eye and becomes a total disability. The employer without this sort of thing (i.e. the exception clause) would have to pay total permanent disability compensation. Then, on the other hand, this also protects the worker with one eye from being denied employment on account of being an extra risk. Now, by simply taking this up in this way it is possible to protect both the employer and to protect the one-eyed employee also * * *." Book I, House Committee Hearings, before Committee on Immigration, Naturalization and Insular Affairs, Interstate and Foreign Commerce, Irrigation and Reclamation, Judiciary, 1926, Vol. 438.

The Congressional Committee dealt with the identical situation involved in this case; and the language used in the section was deemed adequate to carry out the purpose of this discussion. The argument before the committee as quoted, persuasively sustained the interpretation the Court of Appeals places upon the quoted section.

No difficulty is encountered in determining the meaning of the section until an attempt is made to incorporate into it a certain definition of "injury" found in the Act. The Commissioner asserts this must be done. In this assertion he overlooks the basic purpose of the Act as well as the reason for incorporating any definitions into the Act. It cannot be gainsaid, the purpose of Congress, as expressed in the Act, was

to provide compensation for injury which arose out of employment. It was not interested in enacting a law providing generally for health and accident insurance to employees. With this purpose in mind, Congress realized the need of giving the Commissioners, who would administer the Act, a definition indicating the scope within which they should operate and the purpose to be accomplished by the Act. So we have a definition of "injury", for otherwise the Commissioners would be uninformed as to the nature of injuries for which compensation should be awarded. This definition limits the application of the act to injury "arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, * * *." 33 U.S.C.A. 902 (2). No clearer language could be chosen to express an intent to compensate only for injury arising out of employment; no words used, can be interpreted to indicate an intent to compensate for injury which did not arise out of employment.

The Commissioner's theory, therefore, is directly in the teeth of the intent of Congress. He argues the employer should pay compensation benefits for injury which did not arise out of the employment. To state his position, it seems to us, is to state its fallaciousness. To put it differently, in applying the definition of injury, the Commissioner ignores the positive mandate of Congress that only an injury in employment is compensable. In advocating this definition of injury must be applied to the exception clause, found in 8 (f) (1), he advocates payment of compensation for an injury *not* arising in employment. An interpretation should be given the statute which is in accordance with the purpose for which it was enacted. *Helvering* v. *Hammill*, 411 U. S. 504, 84 L.Ed. 303, 131 A.L.R. 1481; *Addison* v. *Holly Hill Fruit Products Co.*, 323 U.S. 607, 88 L.Ed. 1488, 153 A.L.R. 1007. The intent of Congress controls. *U. S.* v. *Ryan*, 284 U.S. 167, 76 L.Ed. 224.

The Commissioner asserts not only the definition of "injury" but also the definition of "disability" must be included. The definition of "disability" leads to no inconsistency with the purpose of the statute or the language of the quoted section. It is only when it is sought to incorporate the definition of "injury" into the definition of "disability" that the purpose of the Act cannot be reconciled with the resulting meaning given the section. It is argued, however, that if a part of the definition of "injury" is omitted, no incongruity results; but to ignore part of the definition is no different from ignoring all of it.

Reliance is placed by the Commissioner upon *National Homeopathic Hospital Association* vs. *Britton* (U.S.C.A. D.C.) 142 F. (2d) 561, where a divided court held the definitions should be so used. Chief Justice Groner dissented. His argument, as set forth in his dissenting opinion (564 to 567) convinced the District Court and the Fifth Circuit Court of Appeals, this dissenting opinion being followed by these courts rather than the opinion by the majority. In all three opinions it was determined, after a careful analysis of the statute, and the Congressional purpose, that the words "disability" and "injury" as used in the quoted section should be given an ordinary meaning. This is the only section in which any incongruity arises from the use of these definitions. It seems, therefore, Congress, in using the expression "previous disability" had no intention of applying a definition for one word of this expression, when such application of a definition not only produces an incongruity, but also thwarts the Congressional intent and purpose: compensation benefits only for injury arising out of industry.

Applying the definitions as suggested by the Commissioner, brings on other difficulties. As emphasized by Judge Groner in his opinion, the Act relates only to maritime workers. Is it to be assumed that the exception clause applies only to persons injured in a maritime employment; or does it apply to injuries in industry where no compensation act existed; or

does it apply to industrial injuries which are not compensable? No answer can be given to these questions from reading the Act; but, answering them is obviated, by giving to the word "disability" its plain, ordinary meaning. The purpose of the exception clause as shown by its legislative history before the committee contemplated no such hair-splitting between industrial accident, compensable accident, maritime accident or disease and accident. Simple words provide that disability *not* caused by the employment should not be the basis for total disability compensation benefits when coupled with an injury which *did* arise in the employment.

It is argued that the rule announced in the Britton case has received support in other decisions. We do not find this support in the cases cited. In *Temperance River Co.* v. *Legarde*, 65 F.Supp. 161, the District Judge thought the Britton case binding because this Court had refused to grant certiorari. The case of *Liberty Stevedoring Co.* v. *Cardillo*, 18 F. Supp. 729, dealt with an injury to a deformed member of an employee, the opinion stating that Section 8(f) had no application. No interpretation of this section was attempted. *Grays Harbor Stevedoring Co.* v. *Marshall*, 36 F. Supp. 814, deals with the aggravation of a preexisting disease, arthritis. In *Wood Preserving Corporation* v. *McManigal*, 39 F. Supp. 177, it is said "* * * accordingly, the case is not governed by Section 8(f) of the Act * * * ."

While the word "injury" is defined in Section 902(2) of the Act, we emphasize a distinctive wording when Congress dealt with the disability compensable under the Act. In defining injury, the Act reads:

> "When used in this chapter — * * * * (2) the term 'injury' means accidental injury or death arising out of or in the course of the employment * * * ."

"Term" is defined by Webster as a "word or expression having a precisely limited meaning or peculiar to a science, art, or the

like; * * * ." Here then, we may say when Congress defined the *term* it gave that term a technical, or peculiar, or limited meaning. It could have omitted the word "term" entirely. As it did not do so, it seems clear that this definition is of a word rather than of a condition expressed by the word. When "disability" was dealt with, we find Congress using this language:

> "When used in this chapter . . . : (10). 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Why did not Congress again define a term? Is it not a logical inference from this change of language that the term "injury" was to be defined, but that the word or term "disability" was not to be defined, the definition relating to the condition represented by the word. This permits the use of the word with its ordinary meaning unless it is used with reference to the disability which is compensable under the Act. So, when the word disability is used in 8(f) (1) without any intent to refer to the kind of disability which is compensable under the Act, but with the intent of eliminating a condition which is not compensable, the ordinary meaning of the word is the only meaning that Congress intended it to have. It is for this reason no confusion results from the use of the word with its ordinary meaning and that confusion does result when it is attempted to abandon this clear meaning for a strained and twisted meaning based upon a supposed definition of a "term" which is not defined by the Act. If this is a technical construction of Section 902, where definitions are found, it is not more technical than is sought by the Commissioner in applying these same definitions to paragraph 8(f) (1). As the *term* "disability" is not defined we have no need to use the definition of the *condition* "disability" in determining the meaning of the section of the Act under consideration.

CASES OF AGGRAVATION OF A DISEASED CONDITION DIFFERENT FROM CASES OF SEPARATE INJURY: Clear thinking may be prevented by the citation of cases dealing with rules applic-

able where a compensable injury *aggravates* a pre-existing *diseased condition*. While the Act provides compensation must be paid for all the consequences of an injury in the employment, when the injury aggravates a pre-existing diseased condition, this does not mean that compensation will be paid for pre-existing disability which was not aggravated by an injury in the employment. The aggravation of an existing condition is only compensable if the aggravation is by reason of injury arising out of and in the course of employment. This is utterly different from a situation where two separate injuries, or an injury plus a condition, neither aggravating the other, produce a particular amount of disability. The cases distinguished between weakness or disease which does not become manifest until a subsequent accident and between a prior disability which resulted from a prior condition or injury. The injury of a man with a diseased arm or a diseased eye imposes liability for compensation benefits for all of the effects of that injury on the diseased member or organ, but when the diseased condition is not affected by the subsequent injury, the diseased condition is not taken into account in determining what compensation benefits are allowable or in determining the extent of disability compensable as arising out of the employment. Our case does not present the aggravation of a preexisting diseased condition. The pre-existing condition continues as it was—the sight in the right eye is no better or no worse as a result of the injury by accident which destroyed the sight in the left eye. The impairment in the right eye continues as it was before the injury to the left eye. Cases of aggravation are inapplicable, for no helpful analogy can be drawn between these different factual situations, to which different rules of law apply.

THE POLICY OF THE ACT: It is argued that the interpretation of Section 8(f) (1), as made by the Fifth Circuit Court of Appeals, is not in accord with the purpose of the Act. This we do not agree to. The purpose of this Act was to provide compensation for employees working on vessels on navigable waters who, although they might be classed as seamen, were

regarded as distinct from members of the crew of the vessel, being persons whose service was more that of laborers as distinguished from that of employees on vessels who aid in her navigation. *South Chicago Dock Company*, v. *Bassett*, 309 U.S. 251, 84 L.Ed. 732. It has never been suggested the purpose of the Act was to provide compensation benefits for this class of laborer simply because he had a physical handicap. The Act, like the State Compensation Acts, sought to impose upon industry responsibility for the injuries caused by employment. No other purpose can be read into any compensation act. To argue, as the Commissioner does, that industry should be burdened with the payment of compensation benefits for disability which did not arise out of accidental injury in the employment or which was not aggravated by injury in the employment, is to argue for an interpretation of compensation acts contrary to that given by every authority and every court. It is the Commissioner's theory which goes contrariwise to the recognized purpose of compensation legislation. His purpose is to burden industry with a responsibility beyond the purpose of the Act. It ignores the Congressional determination that some disabilities should not be compensable by industry, but should be compensable from a fund which Congress created for that purpose. To accept his argument, we must add a liability which was not intended. In doing so we deprive the handicapped workman of a free right of employment by employers willing to accept him "as is", but unwilling to make him whole again. Our interpretation of this section is in accord with the purpose of the Act while the contention of the Commissioner is completely out of harmony with it.

STATE DECISIONS: In his brief (page 21) a federal case and certain state court cases are cited with the statement that these decisions present factual situations virtually identical with that now being considered and that in them the employer was held liable for total and permanent disability compensation benefits. Evidently it is meant the *employer* and not a Special Fund was held responsible. The cases do not sustain

this statement, for no similar facts were involved. In *Killisnoo Packing Co.* vs. *Scott*, 14 F.(2d) 86, the court did not interpret Section 8(f) at all. It was not involved. It was decided the statute involved should be interpreted to allow total disability. That point is conceded here by everyone. The case of *Moore* v. *Western Coal Co.*, 124 Kan. 214, we understand, is no longer effective in Kansas. The other cases cited likewise turn on different points. State court cases are of little value. As is said by the annotator in 142 A.L.R. 822, the conflict in the state courts is due largely to the difference in the wording of the various compensation statutes. There is no uniform answer to the question whether an employee who has lost the sight of one of his eyes should be allowed compensation for total disability where he subsequently loses the sight of the other.

But if the field of State Court decisions is to be entered, we submit the following cases support the respondent's interpretation of Section 8(f) (1):

Lehman vs. *Shmahl*, 179 Minn. 388, 299 N. W. 553; *Kupiak* vs. *Briggs Mfg. Co.*, 286 Mich. 329, 282 N. W. 427; *Houg* vs. *Ford Motor Co.*, 288 Mich. 478, 285 N. W. 27; *Lente* vs. *Lucci*, (Pa.) 119 Atl. 132, 24 A.L.R. 1462; *Catlett* vs. *Chattanooga Handle Co.*, 165 Tenn. 343, 55 S. W. (2d) 257; and *Cain* vs. *Staley Mfg. Co.*, 97 Ind. App. 235, 186 N. W. 265.

THE EFFECT UPON THE SPECIAL FUND: It is asserted the burden of paying compensation for non-industrial previous disability should be placed upon the employer rather than upon the special fund as directed by Congress because this fund may not be sufficient to meet the demands created by the interpretation we have given Section 8(f) (1). The record contains no pleading and no evidence of any factual basis for this contention. We think it should be ignored. While the Commissioner's brief states the balance in the Special Fund and the amount paid in for a particular year, these figures furnish inadequate information for determining the effect of

either interpretation upon the Special Fund of Section 8(f)(1). The suggested danger of exhaustion seems a speculative prediction. The provisions creating the fund have been effective since the passage of the Act in 1927, with apparently no effort on the part of the Commissioner or anyone else to show to Congress the necessity for augmenting the Special Fund. It seems that twenty years is a fairly reasonable time within which to determine the adequacy of the provision made by Congress. If the fund is inadequate for any reason, Congress, upon a proper presentation of facts so indicating, would unquestionably make adequate amendment to the Act. It is not the province of the courts to amend the law. The function of judicial interpretation of a statute is to bring out and give effect to that which is already in it. *E. C. Schroeder Co.* v. *Clifton*, 154 F.(2d). 385, cert. den., 328 U.S. 858, 90 L.Ed. 1629, reh. den., 329 U.S. 821, 91 L.Ed. 699.

> "We agree that the Act is to be liberally construed, but neither the deputy commissioner nor the courts have the power to legislate; * * *." *Kobilkin* v. *Pillsburg*, 103 F. (2d) 667, aff. 309 U.S. 619, 84 L.Ed. 983, reh. den., 309 U.S. 695, 84 L.Ed. 1035.

NEW YORK CASES DO NOT SUSTAIN THE COMMISSIONER: The point is made by the Commissioner (brief page 18) that certain New York cases interpreting the New York Compensation Act sustain his contention. He quotes in a footnote Section 15 (7) of the New York law (brief page 18). We do not agree with his interpretation of these cases. We think we can show he fails to support his contention, by the cases cited, that previously disability must result from an industrial injury before the quoted section applies. In *Pyshnock* v. *Henry Forge & Tool, Inc.*, 247 App. Div. 842, 272 N. Y. 546, 4 N. E. (2d) 729, the only question involved was the sufficiency of the evidence to sustain a finding that complete loss of use was the natural result of the injury. While the eye had sustained a prior injury, it does not appear that it was an industrial injury for which compensation was or could have been paid. In

La Belle v. *Britton Store and Supply Co.*, 247 App. Div. 843, 286 N.Y.S. 347, it can not be determined that Section 15(7) is involved. In *Bervilacqua* v. *Clark*, 225 App. Div. 190, 250 N.Y. 589, 166 N. E. 335, in the opinion by the Circuit Court of Appeals nothing was said except "Order affirmed, with costs on the ground that the disability caused solely by the accident is due to the loss of a member." But in *Shurick* v. *Bayer Co.*, 256 App. Div. 651, 272 N.Y. 217, 5 N.E. (2d) 713, the court interpreted this New York statute without asserting that the prior disability must result from an industrial accident:

> "While it is not now necessary to decide that the disability referred to in the phrase 'suffering from a previous disability,' in the proviso (Subdivision 7), must be one of those mentioned in Subdivision 8, considerations of practical administration demand at least that it be, as to its existence and extent, substantially as certain and as capable of ascertainment as are those. Here, it is doubtful whether the claimant, when he received the later injury, can be said to have been suffering from a previous disability at all. Disability is a word of varied content, not defined in the Compensation Law except in Section 37, which is confined to occupational diseases. Nevertheless, an existing disability is generally reflected in wage-earning capacity. A weakness, whether pathological or traumatic in origin, which does not become manifest until an accident occurs, it not ordinarily thought of as a disability. But even if the condition of the claimant's arm at the time of the later injury be regarded as a disability the extent of its contribution to the later injury is too speculative for practical purposes."

But because of difference in language between the New York Statute and the Longshoremen's and Harbor Worker's Act, no rule by analogy can be applied. Chief Justice Groner well stated this:

> "I have carefully considered the Board's argument that the view expressed is not sustained by the New York compensation cases under the New York law, and several intermediate court decisions are cited to sustain this

assertion. But an examination of these cases discloses that none of them decides the precise point we have here. Besides, the language of the New York and the Federal Acts discloses marked differences." *National Homeopathic Hospital Association of D. C.* v. *Britton*, 147 F. (2d) 561, at 567.

Nothing in the history of the Longshoremen's and Harbor Workers' Act indicates any language of the New York Act or any decision by the New York courts was adopted when Congressional Committees discussed the effect of the Act. To the contrary, the report before the committee cited shows Congress sought to relieve employers from the very liability the Commissioner now seeks to impose upon them.

CONCLUSION

The purpose of the Act is to provide compensation benefits, to be paid by the employer, for injury arising out of employment. It was never intended to burden the employer with compensation benefits for disability which did not arise out of the employment or which was not aggravated by injury in the employment. This purpose is directly indicated by the limitation of liability for compensation benefits to accidental injury arising out of and in the course of the employment. If we lose sight of the words "arising out of and in the course of the employment," we lose sight of the purpose of the legislation. The Commissioner would eliminate these words completely. As stated by the District Judge (R. 12) to adopt the Commissioner's theory will produce, " * * * a result which this court believes is not only contrary to the Congressional intent, but is out of harmony with the remainder of the Act.

The interpretation contended for by the Commissioner contravenes the recognized rules for interpretation:

> "It is our function, however, to interpret and construe statutes, not make them, and not to extend them beyond what appears to be the legislative intent. We cannot obey the Shakespearean maxim and wrest the law

to our authority, even once. The Longshoremen's and Harbor Workers' Act is indeed a remedial statute, enacted to subserve an admirable purpose. It should perforce be construed liberally, even generously; but its provisions should not be so distorted by the courts as to make it a trap for employers." *Motor Boat Sales, Inc.*, v. *Parker*, 116 F. (2d) 789 (Certiorari granted and reversed on other grounds. 314 U.S. 244, 86 L.Ed. 184).

If the Special Fund ever proves to be inadequate, the remedy is with Congress, not here. Speculative prediction should not be the basis of interpretation which requires the payment of compensation benefits for a disability not arising out of the employment when Congress has clearly indicated it desired industry to pay only for benefits for disabilities arising out of the employment.

Respectfully submitted.

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